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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-792

NORTHSIDE REALTY ASSOCIATES, INC., and
ED A. ISAKSON,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
for the Fifth Circuit

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To the United States Court of Appeals
for the Fifth Circuit

Petitioners, Northside Realty Associates, Inc. ("Northside") and Ed A. Isakson (Northside's Executive Vice-President), respectfully pray for a writ of certiorari to review the judgment and opinion on appeal entered on September 23, 1974, and the opinion on petition for rehearing and rehearing *en banc* entered on September 4, 1975, of the United States Court of Appeals for the Fifth Circuit in Docket Number 74-1414.

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OPINIONS BELOW

The initial opinion of the United States District Court for the Northern District of Georgia is unofficially reported in Prentice Hall, Equal Opportunity in Housing Reporter ("P.H.E.O.H. Rptr."), at ¶ 13,552 (N.D. Ga. 1971). The initial opinion of the United States Court of Appeals for the Fifth Circuit ("Northside I") is reported at 474 F.2d 1164 (1973). The opinion of the United States District Court for the Northern District of Georgia on remand from the Court of Appeals is unofficially reported in P.H.E.O.H. Rptr. at ¶ 13,620 (N.D. Ga. 1973). The second opinion of the United States Court of Appeals for the Fifth Circuit ("Northside II") is reported at 501 F.2d 181 (1974). The opinion of the Court of Appeals on petition for rehearing and rehearing *en banc* ("Northside III") is reported at 518 F.2d 884 (1975). All of the above mentioned opinions are set forth in the Appendix hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit in *Northside II* was entered on September 23, 1974. A timely-filed petition for rehearing and rehearing *en banc* was denied on September 4, 1975. This petition for certiorari is filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether, as a prerequisite to the grant of injunctive relief to the Attorney General in a suit brought pursuant to the second alternative ground upon which he is authorized to bring a civil action under Section 813 of the Fair Housing Act of 1968, 42 U.S.C. § 3613 [whenever he "has reasonable cause to believe

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. . . that any group of persons has been denied any of the rights granted by this subchapter and such denial raises an issue of general public importance"], a district court must make findings of fact and conclusions of law which establish that the Attorney General has actually proved a denial of rights raising an issue of general public importance.

2. Whether the Attorney General, in order to secure injunctive relief in a suit brought pursuant to the second alternative ground upon which he is authorized to bring a civil action under Section 813 of the Fair Housing Act of 1968, 42 U.S.C. § 3613 [whenever he "has reasonable cause to believe . . . that any group of persons has been denied any of the rights granted by this subchapter and such denial raises an issue of general public importance"], must prove a violation of the Act which "raises an issue of general public importance" as opposed to some simple violation of the Act.

STATUTES INVOLVED

Fair Housing Act, Section 813, 42 U.S.C. § 3613:

> Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by this subchapter, or that any group of persons has been denied any of the rights granted by this subchapter and such denial raises an issue of general public importance, he may bring a civil action in any appropriate United States district court by filing with it a complaint setting forth the facts and requesting such preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order against the person or persons responsible for such pattern or practice or denial of rights, as he deems necessary to insure the full enjoyment of the rights granted by this subchapter.

STATEMENT OF THE CASE

This action was brought in the district court by the Civil Rights Division of the Justice Department pursuant to Title VIII of the Civil Rights Act of 1968, the Fair Housing Act ("the Act"), 42 U.S.C. § 3601 *et seq.*, alleging that petitioners had engaged in a pattern or practice of racial discrimination against blacks with respect to the purchase and sale of homes in the Metropolitan Atlanta, Georgia, area. The Government sought injunctive relief, claiming that Northside's and Mr. Isakson's actions constituted a pattern or practice of resistance to the Act and had denied groups of persons rights granted by the Act raising an issue of general public importance.

After a three day non-jury trial, the district court found that petitioners had violated the provisions of the Act on three separate occasions. The court found that in early 1968, prior to the effective date of the Act, Mr. Isakson failed to discover the total financial potential of a black couple before determining what price house they could afford; denied, without checking, that Northside had houses listed within their price range; and referred them to a black real estate broker without "co-operating" or receiving a referral fee. The district court said that incident showed "a pattern or practice of discrimination before the effective date of the Act."[1] (A. 6)

The district court found that subsequent to the effective date of the Act Mr. Isakson had discriminated by denying to an unidentified prospective black buyer that he sold real estate, without explaining that Northside Realty, of which Mr. Isakson was then executive vice president, did; and by referring that person to

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[1] In *Northside I* the circuit court held that ". . . we do not think that the District Court's finding of one pre-Act violation, standing alone without a finding of any other factors to support its decision, can justify a pre-Act pattern or practice." (474 F.2d at 1169, A. 19).

two other real estate companies that sold primarily to blacks. Further, the district court found that Mr. Isakson violated the Act in that "he did not treat a Negro broker's offer to 'co-op' in the same manner he would have treated such an offer from a white broker." (A. 7)

The district court noted, after these findings, that the Government had "filed this case and presented it with little evidence to support its position that the defendants were engaged in a pattern or practice of discrimination." It explicated that at "the time suit was filed, the government's case consisted of one pre-Act incident ['the Bowers incident'] and one post-Act incident (which later failed of proof)." Despite those findings and the substantial evidence presented by the defendants demonstrating compliance with the Act, the district court concluded:

> Mr. Isakson's own actions and statements that Congress has exceeded its constitutional limitations, however, indicate his intention on behalf of himself and the company to resist compliance with the purposes of the Fair Housing Act. The Court finds that Mr. Isakson's intentions have manifested themselves in his actions and that black people as a group have thereby been denied the protection guaranteed by the Act. This denial of protection is of sufficient public importance to authorize the relief herein granted.

(A. 8) The district court then enjoined the defendants and their "officers, employees, brokers, agents, and all persons" in concert therewith from discriminatory conduct and ordered them to take affirmative action to prevent future discrimination.

Northside and Mr. Isakson appealed the district court's decision on several grounds of which only two are relevant to the instant petition. They were as follows:

(1) That the two post-Act violations that the district court held Mr. Isakson committed were insufficient to raise

an issue of general public importance justifying the granting of injunctive relief, and

(2) That the district court impermissibly implied an intent to resist compliance with the Act on Mr. Isakson's part because of his statement questioning the constitutionality of the Act.

The court of appeals remanded the case to the district court on the basis of its finding that it could not conclusively determine from the district court findings and conclusions that it had *not* based its decision that the appellants had violated the Act upon Mr. Isakson's verbal challenges to the constitutionality of the Act. Although not essential to its judgment, the circuit court considered and passed on appellants' argument that the Government, through the Attorney General, had failed to prove that the two post-Act violations found were sufficient to raise an issue of general public importance thus entitling the Government to injunctive relief. The circuit court dismissed the appellants' contention as "meritless", stating:

> Just as in his determination whether to prosecute a criminal case, the Attorney General must have wide discretion to determine whether an issue of public importance is raised. "Once the Attorney General alleged that he had reasonable cause to believe that a violation of . . . [the Fair Housing Act] denied rights to a group of persons and that this denial raised an issue of general public importance, he had standing to commence an action in District Court and to obtain injunctive relief upon a finding of a violation of the Act." United States v. Bob Lawrence Realty, Inc., *supra*, 474 F.2d at p. 125 n. 14 (citations omitted).

(*Northside I*, 474 F.2d at 1168, A.^17).

On remand the district court said that it "did not intend to infer that the defendant violated the law by challenging that

law." (A. 29) However, the district court then restated its previous findings of fact and conclusions of law with only minor modifications and stated:

CONCLUSIONS OF LAW

> Section 813, 42 U.S.C.A. § 3613 of the Fair Housing Act places the burden of proof upon the United States to show by a preponderance of the evidence that the defendants have either engaged in a "pattern or practice of resistance" to the rights granted under the Act, or have denied rights secured by the Act to a group of persons, where such denial raises an issue of general public importance . . . *The Court of Appeals has held in this case that the Attorney General's determination of general public importance is conclusive and not subject to review by this Court, Slip Opinion, p. 8.* The question before this Court is whether the plaintiff has met the burden required. (Emphasis added.)

(A. 34) The district court then concluded for the second time:

> The Court finds that Mr. Isakson's intentions have manifested themselves in his actions and that black people as a group have thereby been denied the protection guaranteed by the Act. The denial of protection is of sufficient public importance to authorize the relief herein granted.

(A. 37) And the district court reissued its injunctive order. (A. 37-39)

Petitioners appealed the district court's decision again, raising four assignments of error, only one of which is pertinent to this petition. That assignment urged that the district court had erroneously issued an injunction in that the Attorney General had not proved and the district court had not found the appellants had denied blacks, as a group, rights guaranteed by the Act and that this denial raised an issue of general public importance.

The court of appeals reiterated the position it took with regard to this argument on the first appeal:

> We adhere to our position that the question of what constitutes an issue of general public importance is, absent specific statutory standards, a question most appropriately answered by the executive branch. *Northside, supra,* at 1168. Further, we held that the district court was not clearly erroneous in finding that the defendants violated the act and that the violations, absent Isakson's challenge to the validity of the Act, would alone support the granting of injunctive relief. *Northside, supra,* at 1170-1171.

(*Northside II*, 501 F.2d at 182, A. 42)

Following the court of appeals' decision, Northside and Mr. Isakson filed a Petition for Rehearing and Rehearing *En Banc*. That petition was denied by the decision of the court dated September 4, 1975. (*Northside III*, 518 F.2d 884, A. 45) Petitioners filed a further "Petition for Rehearing so as to Make Corrections and Amendments in Opinion" on September 17, 1975 (A. 58) which was denied October 8, 1975 (A. 67).

REASONS FOR GRANTING THE WRIT

1. *The Decision Below Conflicts With That of the Only Other Circuit to Interpret the Statutory Language in Question.*

Section 813 of the Act, 42 U.S.C. § 3613, provides in pertinent part that

> Whenever the Attorney General has reasonable cause to believe that . . . any group of persons has been denied any of the rights granted by . . . [the Act] and such denial raises an issue of general public importance, he may bring a civil action in any appropriate United States district court by filing with it a complaint setting forth the facts and requesting such preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order against the person or persons responsible for such . . . denial of rights, as he deems necessary to insure the full enjoyment of the rights granted by . . . [the Act].

There is no conflict among the United States Courts of Appeals with regard to the principle that an Attorney General's determination pursuant to 42 U.S.C. § 3613 that he has reasonable cause to believe the existence of a denial of rights raising an issue of general public importance is a non-reviewable determination upon a challenge to the Attorney General's standing to initiate suit under § 3613. There *is* a conflict, however, between the Fifth Circuit Court of Appeals and the Fourth Circuit Court of Appeals with respect to the obligation of a district court presented with such a suit by the Attorney General to determine whether he has in fact proved a denial raising an issue of general public importance.

In *United States v. Hunter*, 459 F.2d 205 (1972), *cert. denied*, 409 U.S. 934 (1972), the Fourth Circuit affirmed, *inter*

alia, the holding of the district court that the defendant Hunter, the editor and publisher of a weekly newspaper, had violated Section 804(c) of the Fair Housing Act, 42 U.S.C. § 3604(c),[2] but disagreed with the district court's denial of injunctive relief based on a finding that the Government failed to prove either that a pattern or practice of resistance existed or that the case reflected a denial raising an issue of general public importance.[3] The Fourth Circuit stated in its opinion that while the district court correctly stated its obligation to give injunctive relief to the Government only if the Government established that either a pattern or practice of resistance or a case raising an issue of general public importance was present, the district court erred in finding that the Government had failed to establish a case raising an issue of general public importance because no one other than the Government had complained of the defendant's discriminatory advertisement and similar advertisements were regularly carried by the other major newspapers in the area.

The Fourth Circuit reasoned that the factors relied upon by the district court were irrelevant to the task of determining whether the Government had established a case raising an issue of general public importance in light of, what it termed, the "clear congressional meaning" attaching to this phrase. While admitting that the term was not defined in the Act nor in its legislative history, the court looked to the legislative history of the Civil Rights Act of 1964 which utilized the nearly identical phrase "case of general public importance." In the legislative his-

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[2] "[It shall be unlawful] to make, print, or publish, or cause to be made, printed, or published, any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, or national origin, or an intention to make any such preference, limitation, or discrimination."

[3] The Fourth Circuit ultimately affirmed the district court's denial of injunctive relief based on established principles of equity. *Hunter, supra*, at p. 219.

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tory of the 1964 Act, a case of general importance was defined as one where:

> The points of law involved are of major significance or . . . the particular decision will constitute a precedent for a large number of establishments. . . .

Hunter, supra, at p. 218. In the Fourth Circuit's opinion, "[t]he draftsmen unquestionably meant to incorporate this definition into the 1968 Act when they used the term 'raises an issue of general public importance.'" *Id.* The court then applied this definition to the facts of the case and held that it involved points of law of major significance and would constitute a precedent for all of the nation's newspapers. Accordingly, the court concluded that the district court erred in deciding that the Government did not establish a denial of rights guaranteed by the Act which gave rise to an issue of general public importance.

The decisions of the Fifth Circuit Court of Appeals in *Northside II* and *III* [and *Northside I*] are in direct conflict with that of the Fourth Circuit in *United States v. Hunter, supra,* as to the obligation of a district court to determine whether the Government must establish a denial raising an issue of general public importance before the court can grant the Government injunctive relief. As indicated above, the Fourth Circuit requires the district court to test the Government's evidence against the definition ascribed to the phrase "issue of general public importance." In *Northside II* and *III*, the Fifth Circuit has reaffirmed its position, first expressed in *United States v. Bob Lawrence Realty, Inc.*, 474 F.2d 115, 125 n. 14 and *Northside I* that:

> [T]he question of what constitutes an issue of general public importance is, absent specific statutory standards, a question most appropriately answered by the executive branch.

(*Northside II*, 501 F.2d at 182, A. 42). This directive compels district courts within the Fifth Circuit to conclude that "the

Attorney General's determination of general public importance is conclusive and not subject to review" and has even led at least one district court within the Fourth Circuit to do the same. *United States v. Hughes Memorial Home*, 396 F.Supp. 544, 551-52 (W.D. Va. 1975). By doing so, district courts ignore their statutory duty to require the Government to prove the existence of what it has certified by its complaint it has reasonable cause to believe, *namely*, the existence of a denial raising an issue of general public importance.

The existence of this conflict between the Fifth Circuit Court of Appeals and the Fourth Circuit Court of Appeals justifies the grant of certiorari to review the judgment below.

It should also be noted, with more emphasis than a parenthetical exposition, that in this case below there has been no finding "by the executive branch" that the facts which the Attorney General proved reflected any denial raising an issue of general public importance. The district court noted that the Government brought the case "with little evidence to support its position" and upon the basis of "one pre-Act incident and one post-Act incident" which "later failed of proof" (A. 8). The ultimate findings as to post-Act acts, and those upon which the injunction was issued, related to Mr. Isakson's handling of an anonymous black telephone caller in the spring of 1970 and a telephone conversation with Mr. Dawson, a black real estate broker, in 1970. (A. 2-3) No attorney general ever said that those two incidents reflected any denial raising an issue of general public importance. Nor has any court ever so concluded, contrary to the Fifth Circuit's erroneous intimation (A. 45, n. 2) and that court's statements that the district court "found" a pattern or practice violation of the Act are blatantly if not brazenly, inaccurate. *See* Petition for Rehearing, paragraphs 2 and 10 (A. 60-63, 66-67). It is unfortunate that this Honorable Court must circumscribe the exercise of its powers to correct errors of fact,—a limitation upon its activity which appears to

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embolden the circuit courts to heavy-handed squashing of those who have the temerity to question decisions (*Cf. Northside III* (A. 45), petitioners' subsequent petition for rehearing (A. 58), and the summary denial thereof (A. 69)). This aspect of the case below,—the plain error in the conclusion that someone had found upon the basis of the acts proved that there was a denial raising an issue of public importance and the erroneous conclusion that the district court found a pattern or practice of violation of the Act,—would appear to warrant grant of certiorari and a summary reversal.

2. *The Proper Interpretation of the Prerequisites to a Grant of Injunctive Relief by a District Court Presented With a Suit Brought Pursuant to the Second Alternative of Section 813 of the Fair Housing Act Is of Significance and Importance.*

It is evident from a reading of the Fair Housing Act of 1968 —in particular those sections thereof dealing with the separate and distinct rights of private persons [Section 812, 42 U.S.C. § 3612] and the Attorney General [Section 813, 42 U.S.C. § 3613] to bring civil actions to seek redress for alleged violations of the Act—that it was the intent of Congress that the Attorney General *not* enforce the private civil rights created by the Act *unless* a specific violation had a measurable *public* impact. To this end, the Congress limited the Attorney General's right to bring suit pursuant to Section 813 to only those instances in which he had a reasonable cause to believe there was a pattern or practice of resistance to the Act or a denial of rights guaranteed by the Act which gives rise to an issue of general public importance.

The number of cases arising under the Act is not decreasing. At the present and for the future, the Attorney General's right to have injunctive relief after his allegation of a denial of rights guaranteed by the Act raising an issue of general public im-

portance is and will be of concern to courts and litigants. The Fifth Circuit's decisions below hold simply that the Attorney General's allegation of reason to believe the existence of the denial of rights raising an issue of general public importance may not be questioned as a matter of standing *and need not be proved as a predicate to the granting of relief* would appear to defy Congressional intent. Certainly, those decisions are more likely to endow the Attorney General with unbridled inquisitional powers than the more reasoned decision of the Fourth Circuit with which they conflict.

By adhering in *Northside II* to the position that what constitutes an issue of general public importance is more appropriately answered by the executive branch (501 F.2d at 182, A. 42), the Fifth Circuit has equated the Attorney General's proof of any violation of the Act with proof of a denial raising an issue of general public importance and has directed the district courts within that Circuit to grant injunctive relief accordingly. This conclusion is borne out by the court's reliance on and reference below to its opinion in *Northside I*. There the court twice said that the district court could have based its grant of injunctive relief *solely* upon a finding that the Act was violated by the two post-Act incidents found to have been committed by Mr. Isakson.[4]

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[4] The Fifth Circuit said (474 F.2d at 1169, 1171, A. 19, 22):

> The court might have based its granting injunctive relief:
>
> * * * * * * *
>
> (4) solely upon a finding that the two post-Act incidents violated the Act and denied rights protected by the Act to a group of persons.
>
> * * * * * * *
>
> The government correctly urges that if we ignore the District Court's statements concerning appellant Isakson's challenge to the validity of the Fair Housing Act, the District Court's finding that Isakson committed two post-Act violations is not clearly erroneous and would alone support the granting of injunctive relief.

The erroneous interpretation of the Attorney General's right to injunctive relief reflected in the Fifth Circuit's decisions in *Northside II* and *III* must be rectified. Otherwise, the Attorney General, by judicial legislation, would be enabled to enforce private civil rights created by the Act where the denial thereof was *without* measurable public importance impact. Congress could hardly be thought to have intended, when it wrote that the Attorney General could bring a § 3613 suit only upon reasonable cause to believe that there had been a denial raising an issue of general public importance, that the courts would hold the Attorney General in fact neither had to have any such reasonable cause to believe nor to prove the existence of any such denial but could get an injunction upon his own *ipse dixit*.

CONCLUSION

For the above reasons a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted

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December 3, 1975

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United States District Court
Northern District of Georgia
Atlanta Division

United States of America vs. Northside Realty Associates, Inc., and Ed A. Isakson	Civil Action File No. 13932

ORDER

This action was brought by the United States pursuant to Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601, *et seq.* The case was heard by the Court sitting without a jury on July 7-9, 1971. Having considered the evidence as presented by both parties, the Court makes the following findings of fact:

Northside Realty Associates, Inc. is incorporated under the laws of the State of Georgia and is licensed to engage in the listing and selling of real estate. Its executive vice-president, Ed Isakson, is also the sales manager for one of the Company's seven residential sales offices. Mr. Isakson is a licensed broker, and it is his broker's license that inures to the benefit of the Company. The parties have stipulated, however, that Mr. Isakson personally has neither advertised, shown, nor sold any residential property since March 23, 1960.

In the Atlanta area, Northside maintains nine offices, each under the supervision of a sales manager-associate broker (except for the Buckhead office which is directly supervised by the defendant, Ed Isakson). Seven of these offices are engaged in the sale of residential property. All of the offices are located

in the northeastern and northwestern areas of the suburban metropolitan Atlanta area. Approximately 165 saleswomen are associated with and licensed under Northside Realty.

Northside, through its salespeople and brokers, acts as agent for listing sellers by presenting offers on behalf of potential buyers. Commissions are paid by the sellers when sales are consummated. The majority of such sales involve single family dwellings while a smaller proportion involve lots and multiple dwellings or commercial property.

In the three years since the effective date of the Fair Housing Act, not a single one of the more than 3,000 homes sold by Northside has been sold to a Negro.

Sometime between February and May, 1968, a black couple named Bowers visited Northside's Buckhead office and talked with defendant Ed Isakson. Mr. Bowers' purpose in going to the Northside office was to investigate an advertised listing for an $18,000 to $18,500 home. After learning the amount of Mr. Bowers' salary, Mr. Isakson told the Bowers that they could not afford an $18,000 house and referred them to a Negro-owned southwest Atlanta real estate firm. Mr. Isakson made no attempt to inquire of his agents whether Northside had any available listing within Mr. Bowers' price range, nor did he make the usual inquiries into Mr. Bowers' financing capabilities.

In the spring of 1970, defendant Isakson received a telephone call from a man recently transferred to Atlanta from Detroit. The caller stated that he was a black professor at one of the black colleges, and that he wanted to buy a house advertised by Northside. Mr. Isakson responded by saying that he had no houses advertised and that the caller's "interest would be best served" if he contacted another real estate company that sold primarily in the southwest Atlanta area. Mr. Isakson related this incident to a meeting of the dekalb [sic] Women's Real Estate Council held later in the spring of 1970. At that meeting, Mr.

Isakson told the audience that while talking to this black caller, he told the caller that "he did not sell real estate, and that he had not sold real estate since March 23, 1960." He held this method out as a model for white real estate salespeople who did not wish to deal with blacks.

The Reverand [sic] Sam Williams telephoned Mr. Isakson concerning Mr. Isakson's conversation with the unnamed black professor from Detroit. When confronted with allegations of discrimination, Mr. Isakson failed to deny them.

Mr. Harold Dawson, a black real estate broker, who is a member of the City Planning Commission and a former president of the Empire Real Estate Board, made a telephone call to defendant Isakson in the course of business in 1970. During their conversation, Mr. Dawson asked if Mr. Isakson could help him with a client. Mr. Isakson reminded Mr. Dawson of his involvement in this lawsuit, and indicated that he "would be in a better position" to assist Mr. Dawson at some later date. The conversation ended at that point.

Mrs. Patricia D. Randolph, a licensed real estate agent in Atlanta, testified that in June of 1970 she contacted Mrs. Katherine Gribble, a Northside agent, to "cooperate" in showing one of her listings to a white client of Mrs. Randolph's. Mrs. Randolph claims that during their conversation, Mrs. Gribble asked if Mrs. Randolph's client was black, and after being told that he was not, Mrs. Gribble volunteered that if she knew a potential client was black, she would fail to show up for any appointment with him. Mrs. Randolph further stated that Mrs. Gribble later showed Mrs. Randolph and her client the house inquired about and at that time gave Mrs. Randolph her business card. Mrs. Randolph produced this card during the trial. When placed on the witness stand, Mrs. Gribble testified that she had no knowledge of ever having talked with Mrs. Randolph. She also contended that she had never made an appointment with a black person that she did not keep,

and that she had served to the best of her ability the only black person who had ever contacted her. From the testimony given by these two women, the Court finds that even if this incident occurred as Mrs. Randolph described, it represented only the spontaneous statement of an agent describing her own conduct and not describing the policy of the company or defendant Isakson.

Mrs. Ameryliss Hawk, an assistant professor of speech at a local black college, testified that she called Northside Realty on June 2, 1970, and after asking for the sales manager, was connected with Mr. Isakson. She was quite certain of the date of the call as she had gone to the hospital later that same evening and delivered her third child. Mrs. Hawk claims she told Mr. Isakson that she was interested in a four bedroom house in Area 1 (an area in which Northside sells property) in the $35,000 price range. After a brief, cordial conversation, Mrs. Hawk allegedly told Mr. Isakson that she was black. At this point, Mr. Isakson purportedly said he could not help a black family, but that he could recommend the names of two other real estate companies which would help her. Mr. Isakson denied ever having talked with Mrs. Hawk and further proved that he was not in Atlanta on June 2, 1970. From the evidence presented, Mr. Isakson proved to the satisfaction of the Court that on June 2, 1970, he was in Valdosta, Georgia, on business, and he was not in his Atlanta office at anytime that day. The Court finds that since Mr. Isakson was in Valdosta, Georgia, with Mr. John McTier, a Valdosta attorney, on June 2, 1970, Mrs. Hawk could not have had any conversations with him on that date. Therefore, the Court finds that if such a conversation did in fact take place, it must have occurred on some date other than June 2, 1970. The Court, however, is unable to assume that Mrs. Hawk had this conversation with Mr. Isakson on some date other than June 2, 1970, because of Mrs. Hawk's definite testimony as to the date on which she made the call. From the evidence presented, the plaintiff did not prove to the Court that Mrs. Hawk's alleged talk with Mr. Isakson did in fact take place.

BLEED THROUGH

Conclusions of Law

Section 810(e), 42 U.S.C.A. § 3610(e) of the Fair Housing Act places the burden of proof upon the Attorney General to show by a preponderance of the evidence that the defendant has engaged in a "pattern or practice of resistance" toward rights granted under the Act or a pattern or practice which constitutes a general public importance denial of such rights to any group of persons protected by the Act. *United States v. West Peachtree-Tenth Corp.*, 437 F.2d 221 (5th Cir. 1971); *United States v. Mitchell*, 327 F.Supp. 476, 481-484 (N.D. Ga., 1971); *United States v. Bob Lawrence Realty, Inc.*, 327 F.Supp. 487, 492-493 (N.D. Ga., 1971). The question before this Court is whether the plaintiff has met that burden by proving that Northside Realty and Ed Isakson have engaged in a discriminatory "pattern or practice" of selling real estate.

The Bowers Incident

It appears to the Court that Mr. Isakson treated the Bowers in a discriminatory manner. It was admittedly abnormal for Mr. Isakson to deal directly with "walk-in" customers, since Isakson himself stated that he never handles would-be purchasers unless there is no other sales person in the office. Further, it would seem abnormal for a veteran real estate salesman: (1) to fail to discover the buyer's total financial potential before determining what priced house the buyer could afford; (2) to deny that the company had any houses listed within the price range of the potential buyer without consulting the listing book or the agents in the office; and (3) to refer a potential buyer to another real estate company without "co-operating" or receiving a referral fee. Furthermore, Mr. Isakson stated in his deposition that he had never referred a white buyer to a black real estate broker as he did

Mr. Bowers. In short, Mr. Isakson treated the Bowers in a different manner than he would have treated white customers.

Although the Bowers' incident occurred prior to the effective date of the Act, it is relevant to this case in that it shows a past practice of discrimination which this Court feels has been carried forward to the defendant's [sic] present operation. Defendant Isakson, himself, stated that at no time after the Act was passed, did he attempt to explain its significance to his salespeople nor did he attempt to change his or Northside's policy or method of operation with respect to blacks. When there is a finding of a pattern or practice of discrimination before the effective date of the Act, and little or no evidence indicates a post-Act change in such pattern or practice up to the time suit is filed, a strong inference arises that the pre-Act pattern or practice continued after the effective date of the Act, and such evidence is of significant probative value. *U. S. v. West Peachtree Tenth Corp., supra.*

The Detroit Professor Incident

Although the events surrounding the phone call from the Detroit professor are vague due to the anonimity of the caller, Mr. Isakson's own testimony is sufficient to show the Court that he treated this caller in a different manner than he would have treated a while caller. The defendant Isakson went through none of the usual procedures for qualifying this customer in terms of income or geographical area desired, but rather referred him immediately to two other real estate companies which sold primarily to blacks. Mr. Isakson stated that he made this referral because he felt that this client's interest would "best be served" by going elsewhere. Such subjective standards which result in blacks not being served or admitted are inherently suspect. *U. S. v. West Peachtree Tenth Corporation, supra; U. S. v. Sheet Metal Works,* 416 F.2d 123

(8th Cir., 1969). Once again, Mr. Isakson referred a black to another company without "cooperating" or claiming a referral fee. This fact alone is unusual for one engaged in a commercial venture to make a profit.

It is undisputed that Mr. Isakson told the black professor that he, himself, "did not sell houses" and further, that he had not advertised any houses in the previous day's newspaper. It appears that Mr. Isakson made these statements without making it clear that although Mr. Isakson, himself, did not sell or advertise houses, Northside Realty did both. One may not be allowed to use such half-truths to avoid the purposes of the Fair Housing Act. Failure to give a Negro adequate information or aid when such information or aid is ordinarily given to whites has been held to be discriminatory conduct. *U.S. v. West Peachtree Tenth Corp., supra.*

Conversation With Mr. Dawson

In his conversation with Mr. Dawson, Mr. Isakson showed that he did not treat a Negro broker's offer to "co-op" in the same manner he would have treated such an offer from a white broker. The manner in which Mr. Isakson made reference to the pendency of this suit discouraged and, in fact, ended their conversation. Furthermore, this reference could have had little other meaning than to suggest that Mr. Isakson would not "cooperate" with any black realtor unless ordered to do so by this Court. This Act of discrimination constitutes a violation of § 804(a) of the Fair Housing Act, 42 U.S.C. § 3604(a) since Section 804(a) makes it unlawful to make a dwelling unavailable to any person on account of race.

The Fair Housing Act should be given a liberal construction to accomplish the purpose of eliminating racial discrimination. In this regard, the Act prohibits subtle, as well as, more obvious

forms of discrimination, and courts should look to each transaction in its entirety to prevent indirect, as well as, direct methods of discrimination. Therefore, this court will not allow Mr. Isakson and Northside Realty to circumvent the purposes of the Act by the methods used in Mr. Isakson's dealings with the Bowers, Mr. Dawson, and the Detroit professor.

The Court takes note that the government filed this case and presented it with little evidence to support its position that the defendants were engaged in a pattern or practice of discrimination. At the time suit was filed, the government's case consisted of one pre-Act incident and one post-Act incident (which later failed of proof). Mr. Isakson's own actions and statements that Congress has exceeded its constitutional limitations, however, indicate his intention on behalf of himself and the company to resist compliance with the purposes of the Fair Housing Act. The Court finds that Mr. Isakson's intentions have manifested themselves in his actions and that black people as a group have thereby been denied the protection guaranteed by the Act. This denial of protection is of sufficient public importance to authorize the relief herein granted.

Injunction

NOW THEREFORE, pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS ORDERED, ADJUDGED AND DECREED that the defendants Northside Realty Associates, Inc., Ed A. Isakson, all the corporate defendant's officers, employees, brokers, agents and all persons in active concert or participation with any of them are enjoined from:

(1) Failing or refusing to negotiate for the sale of any dwelling, and from making any dwelling unavailable to any person because of race, color, religion, or national origin;

(2) Discriminating against any person in the terms, conditions, or privileges of purchase of a dwelling, or in the serv-

ices or facilities connected with such sale or purchase or with real estate brokerage, because of race, color, religion or national origin;

(3) Representing, explicitly or implicitly, to any person because of race, color, religion or national origin, that any dwelling is unavailable for sale or inspection when such dwelling is, in fact, available;

(4) Discriminating against any person or persons on account of race, color, religion or national origin with respect to engagement of his services by defendants or any of them;

(5) Failing or refusing to cooperate with any broker or any representative of any corporate or individual broker, with respect to the sale or negotiation for sale of any dwelling, because of the race, color, religion, or national origin of the broker, the sales person, or the client on whose behalf such available dwellings are being sought, or because of racial occupancy patterns in any place or area.

IT IS FURTHER ORDERED that the defendants shall forthwith adopt and implement the following affirmative program to assure non-discriminatory treatment of Negroes and to correct the effects of their past discriminatory practices and image:

(1) The defendants shall, within 30 days of the entry of this Order, conduct an educational program for its sales personnel and other agents and employees to inform them of the provisions of this decree and their duties under the Fair Housing Act. Such a program shall include the following:

(a) A copy of this decree shall be furnished to each salesperson and other employee;

(b) By general meeting or individual conference, the defendants shall inform each salesperson and other employee of the provisions of this decree and of the duties

of the company and its agents and employees under the Fair Housing Act.

(2) Throughout the calendar years 1972 and 1973, the defendants shall maintain separate records on each inquiry from potential buyers and/or sellers who are identified or are identifiable as members of the Negro race. Each record should include the following information:

(a) the inquirer's name;

(b) the services requested or desired;

(c) the services actually rendered;

(d) the name of the person and the office handling the inquiry or transaction;

(e) the date of the initial inquiry;

(f) the date the service, if any, was rendered;

(g) if no service was rendered, the reason therefor.

The defendants shall maintain these records as permanent files of the company for three years from this date unless further ordered by this Court. Furthermore, the defendants shall make these records available for inspection by a representative of the Attorney General of the United States at six-month intervals during 1972 and 1973.

IT IS SO ORDERED this 29th day of December, 1971.

/s/ William C. O'Kelley
William C. O'Kelley
United States District Judge

United States of America, Plaintiff-Appellee,

v.

Northside Realty Associates, Inc., and Ed A. Isakson, Defendants-Appellants.

No. 72-2151.

United States Court of Appeals,
Fifth Circuit.

March 14, 1973.

BEFORE GEWIN, GOLDBERG and DYER, Circuit Judges.

GOLDBERG, Circuit Judge:

This is an appeal from an order enjoining appellants, Northside Realty Associates, Inc. and its Executive Vice President, Ed A. Isakson, from violating the Fair Housing Act of 1968. Although we are unable to ascertain the precise legal rationale for the District Court's decision, the Court apparently based its decision on constitutionally impermissible grounds. We therefore remand for fresh findings of fact and conclusions of law.

This action was brought by the Civil Rights Division of the Justice Department pursuant to Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601 et seq., alleging that appellants had engaged in a policy and practice of racial discrimination against Blacks with respect to the purchase and sale of homes in the Metropolitan Atlanta, Georgia area. The government sought injunctive relief, claiming that appellants' actions constituted a pattern or practice of resistance to the Fair Housing Act of 1968, and had denied groups of persons rights granted

by the Act raising an issue of general public importance. *See* 42 U.S.C. § 3613.[1]

After a three day non-jury trial, the District Court made the following pertinent factual findings:

> Northside Realty Associates, Inc. is incorporated under the laws of the State of Georgia and is licensed to engage in the listing and selling of real estate. Its executive vice president, Ed Isakson, is also the sales manager for one of the Company's seven residential sales offices. Although Ed Isakson has not advertised, sold or shown any residential property since 1960, his broker's license inures to the benefit of the Company.
>
> Northside, through its 165 salespeople and its brokers, acts as agent for listing sellers by presenting offers on behalf of potential buyers. Commissions are paid by the sellers when sales are consummated. The majority of such sales involve single family dwellings while a smaller proportion involve lots and multiple dwellings or commercial property. In the three years since the effective date of the Fair Housing Act, not a single one of the more than 3,000 homes sold by Northside has been sold to a black person.
>
> Prior to the effective date of the Fair Housing Act, Ed Isakson violated the provisions of the Act by treating a black couple, the Bowers, in a discriminatory manner when

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[1] 42 U.S.C. § 3613 (Section 813, Civil Rights Act of 1968)

SEC. 813(a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by this title, or that any group of persons has been denied any of the rights granted by this title and such denial raises an issue of general public importance, he may bring a civil action in any appropriate United States district court by filing with it a complaint setting forth the facts and requesting such preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order against the person or persons responsible for such pattern or practice or denial of rights, as he deems necessary to insure the full enjoyment of the rights granted by this title.

he: (1) failed to discover the Bowers' total financial potential before determining what priced house they could afford; (2) denied that Northside had any houses listed within the price range of the Bowers without consulting the listing book or the agents in the office; and (3) referred the Bowers to a black real estate broker without "co-operating" or receiving a referral fee, when he had never referred a white buyer to a black real estate broker. This violation evidenced a pre-Act practice of violating the Fair Housing Act.

Subsequent to the effective date of the Fair Housing Act, Ed Isakson violated the provisions of the Act on two separate occasions. On one occasion he discriminated by denying to a prospective black buyer that he, Isakson, sold real estate, without explaining that Northside Realty, of which he was executive vice-president, did; and by immediately referring the black buyer to two other real estate companies that sold primarily to blacks. Isakson subsequently held this mode of behavior out as a model to be employed by white real estate people who did not wish to deal with Blacks. On a second occasion, Isakson violated the Act by showing an intention not to co-operate with a black real estate broker unless ordered to do so by the District Court.

Finally, Isakson manifested an intent not to comply with the Fair Housing Act by stating that Congress had exceeded its constitutional authority in enacting the Fair Housing Act.[2]

After making the above findings of fact and conclusions of law, the Court held:

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[2] In addition, the District Court found that allegations concerning statements made by one of Northside Realty's sales agents were irrelevant because those statements, even if proved, would not represent the sales policy of Northside Realty. The District Court also found that the allegations of one of the government's witnesses were not proved, not that they were "perjured" as appellants continually and erroneously state in their brief.

> "The Court finds that Mr. Isakson's intentions [to resist compliance with the Act] have manifested themselves in his actions and that black people as a group have thereby been denied the protection guaranteed by the Act. This denial of protection is of sufficient importance to authorize the relief herein."

The Court then enjoined appellants from further discriminatory conduct and ordered them to take affirmative action to prevent future discrimination.[3]

Appellants attack the District Court's order on a number of grounds:

> (1) The two post-Act violations of the Fair Housing Act that the District Court found occurred were insufficient to raise an issue of general public importance justifying the granting of injunctive relief.

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[3] The District Court issued the following injunction:

> NOW THEREFORE, pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS ORDERED, ADJUDGED AND DECREED that the defendants Northside Realty Associates, Inc., Ed A. Isakson, all the corporate defendant's officers, employees, brokers, agents and all persons in active concert or participation with any of them are enjoined from:
>
> (1) Failing or refusing to negotiate for the sale of any dwelling, and from making any dwelling unavailable to any person because of race, color, religion, or national origin;
>
> (2) Discriminating against any person in the terms, conditions, or privileges of purchase of a dwelling; or in the services or facilities connected with such sale or purchase or with real estate brokerage, because of race, color, religion or national origin;
>
> (3) Representing, explicitly or implicitly, to any person because of race, color, religion or national origin, that any dwelling is unavailable for sale or inspection when such dwelling is, in fact, available;
>
> (4) Discriminating against any person or persons on account of race, color, religion or national origin with respect to engagement of his services by defendants or any of them;
>
> (5) Failing or refusing to cooperate with any broker or any representative of any corporate or individual broker, with re-

(2) The District Court's finding that appellant Isakson violated the Act was insufficient to support the conclusion of wrongdoing by Northside Realty.

(3) A finding of only one pre-Act violation does not support a finding of a pre-Act pattern or practice of violating the Fair Housing Act.

(4) The District Court's finding that appellant Isakson violated the Act on three occasions was based upon a legally impermissible inference drawn from Isakson's constitutionally protected challenge to the Act and was clearly erroneous.

We find that appellants' first two contentions are without merit but that his third and fourth points require that we remand to the District Court for further proceedings.

I. PUBLIC IMPORTANCE

Appellants urge that the District Court's finding of two post-Act violations by Mr. Isakson is insufficient to establish an issue

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spect to the sale or negotiation for sale of any dwelling, because of the race, color, religion, or national origin of the broker, the sales person, or the client on whose behalf such available dwellings are being sought, or because of racial occupancy patterns in any place or area.

IT IS FURTHER ORDERED that the defendants shall forthwith adopt and implement the following affirmative program to assure nondiscriminatory treatment of Negroes and to correct the effects of their past discriminatory practices and image:

(1) The defendants shall, within 30 days of the entry of this Order, conduct an educational program for its sales personnel and other agents and employees to inform them of the provisions of this decree and their duties under the Fair Housing Act. Such a program shall include the following:

(a) A copy of this decree shall be furnished to each salesperson and other employee;

(b) By general meeting or individual conference, the defendants shall inform each salesperson and other employee of the

of general public importance and that injunctive relief is therefore not authorized by 42 U.S.C. § 3613.[4] This contention is meritless. The question of what constitutes an issue of general public importance is, absent specific statutory standards, a question most appropriately answered by the executive branch. United States v. Bob Lawrence Realty, Inc., 5 Cir. 1973, 474 F.2d 115. *See* United States v. Greenwood Municipal Separate School Dist., 5 Cir. 1969, 406 F.2d 1086, 1090; Boyd v. United States, E.D.N.Y. 1972, 345 F. Supp. 790, 794. Just as in his determination whether to prosecute a criminal case, the Attorney General must have wide discretion to determine whether an issue of public importance is raised. "Once the Attorney General alleged that he had reasonable cause to believe that a violation of . . . [the Fair Housing Act] denied rights to a group of persons and that this denial raised an issue of general public importance, he had standing to commence an action in District Court and to

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provisions of this decree and of the duties of the company and its agents and employees under the Fair Housing Act.

(2) Throughout the calendar years 1972 and 1973, the defendants shall maintain separate records on each inquiry from potential buyers and/or sellers who are identified or are identifiable as members of the Negro race. Each record should include the following information:

(a) the inquirer's name;

(b) the services requested or desired;

(c) the services actually rendered;

(d) the name of the person and the office handling the inquiry or transaction;

(e) the date of the initial inquiry;

(f) the date the service, if any, was rendered;

(g) if no service was rendered, the reason therefor.

The defendant shall maintain these records as permanent files of the company for three years from this date unless further ordered by this Court. Furthermore the defendants shall make these records available for inspection by a representative of the Attorney General of the United States at six-month intervals during 1972 and 1973.

[4] *See* note 1, *supra*.

obtain injunctive relief upon a finding of a violation of the Act." United States v. Bob Lawrence Realty, Inc., *supra*, 474 F.2d at p. 125 n. 14 (citations omitted).

II. CORPORATE LIABILITY

Northside Realty argues that the District Court's findings of one pre-Act violation and two post-Act violations by the individual appellant, Ed Isakson, are insufficient to impute liability to the corporate appellant, Northside Realty. Northside urges that the District Court's finding of corporate liability does not comport with this Circuit's decision in Standard Oil Co. of Texas v. United States, 5 Cir. 1962, 307 F.2d 120, because (1) the evidence fails to establish that Isakson was acting within the scope of his employment when the violations occurred, since by stipulation Isakson is not normally a real estate salesperson, and (2) Isakson was not shown to have been acting with the purpose of benefiting the corporate appellant when he violated the Act. In light of the fact that Ed Isakson (1) is the Executive Vice President of Northside Realty, (2) is the broker whose license inures to the benefit of the corporation and enables it to engage in the business of selling real estate, and (3) directly supervises one sales office of Northside Realty and is in charge of hiring or selecting the sales managers for the other Northside offices, we do not think it clearly erroneous for the District Court to conclude that appellant Isakson acted within the scope of his duties when he spoke to customers at the office that he supervised and when he discussed sales policy with other people in the real estate business. Nor do we think the District Court was clearly erroneous in finding that these activities were conducted with the intention of benefiting the corporation for which Isakson served as executive vice president. *See* Standard Oil Co. of Texas v. United States, *supra*.

III. THE AMBIGUITIES OF THE DISTRICT COURT'S ORDER

42 U.S.C. § 3613 authorizes the District Court to grant injunctive relief pursuant to a complaint by the Attorney General if the court finds (1) an individual pattern or practice of acts violating the Fair Housing Act, *see* United States v. Reddoch, 5 Cir. 1972, 467 F.2d 897; United States v. West Peachtree Tenth Corp., 5 Cir. 1971, 437 F.2d 221; or (2) a group pattern or practice of violating the Act, *see* United States v. Bob Lawrence Realty, Inc., 5 Cir. 1973, 474 F.2d 115; or (3) that an act, or acts violative of the Fair Housing Act denied a group of persons rights protected by the Act, *see* United States v. Bob Lawrence Realty, Inc., *supra*.

In considering the Attorney General's request for injunctive relief in the instant case, the District Court stated the issue in this manner:

> "The question before this Court is whether the [government] . . . has met [its] . . . burden of proving that Northside Realty and Ed Isakson have engaged in a discriminatory 'pattern or practice' of selling real estate."

However, the Court subsequently held:

> "The Court finds that Mr. Isakson's intentions [to resist compliance with the Act] have manifested themselves in his actions and that black people as a group have thereby been denied the protection guaranteed by the Act. This denial is of sufficient public importance to authorize the relief herein granted."

The District Court's conclusion of law thus does not respond to its statement of the issue, and we are unable to ascertain clearly the legal rationale of the court's decision. The court might have based its granting injunctive relief: (1) upon a finding that the Bowers incident evidenced a pre-Act pattern or practice of vio-

lating the Fair Housing Act that was continued after the effective date of the Act; or (2) upon a finding that Isakson's verbal challenge to the constitutionality of the Fair Housing Act evidenced an intent to violate the Act that was carried out in two post-act incidents; or (3) upon a finding that two post-Act incidents violated the Act and evidenced a pattern or practice of violating the Act; or (4) solely upon a finding that the two post-Act incidents violated the Act and denied rights protected by the Act to a group of persons.

Appellants argue that the District Court's order was based on a finding that appellant Isakson's conduct toward the Bowers established a pre-Fair Housing Act pattern or practice of discriminatory conduct that the Court felt was continued by appellants subsequent to the effective date of the Act. In United States v. West Peachtree Tenth Corp., *supra*, we discussed the meaning of the terms "pattern or practice" as utilized in 42 U.S.C. § 3613: "The words 'pattern or practice' were not intended to be esoteric words of art. There is nothing magic in their meaning. To be sure, they were intended to encompass more than an 'isolated or accidental or peculiar event.' " United States v. West Peachtree Tenth Corp., *supra*, 437 F.2d at 227 (citations omitted). Although, "[e]ach case must turn on its own facts," *id.*, we do not think that the District Court's finding of one pre-Act violation, standing alone without a finding of any other factors to support its decision, can justify a finding of a pre-Act pattern or practice. The District Court could thus not properly base a finding of a Post-Act pattern or practice solely on a finding that the Bowers incident evidenced a pre-Act pattern or practice that subsequently was continued.

Appellants also urge that the District Court's finding that appellant Isakson violated the Fair Housing Act on three occasions was predicated upon a legally impermissible inference of wrongful intent that the Court deduced from Isakson's constitutionally protected challenges to the authority of Congress to

pass the Fair Housing Act. Appellants also contend that the District Court's findings in this regard were clearly erroneous.

In a pre-trial statement entered into the record, Isakson stated:

> "I am familiar with the Fair Housing or Civil Rights Act of 1968; and I know that the Act makes certain actions illegal, *so far as Congress has authority within the limitations of the U. S. Constitution* to make such actions illegal. Although I believe that my firm and I have complied with the Act, I personally believe that Congress may have exceeded its authority under the Constitution in enacting the Act and I intend to challenge Congress' action in this litigation in hopes that this Court will interpret the law and decide the case in my favor."

The District Court held:

> "The Court takes note that the government filed this case and presented it with little evidence to support its position that the defendants were engaged in a pattern or practice of discrimination. At the time suit was filed, the government's case consisted of one pre-Act incident and one post-Act incident (which later failed of proof). Mr. Isakson's own actions and statements that Congress has exceeded its constitutional limitations, however, indicate his intention on behalf of himself and the company to resist compliance with the purposes of the Fair Housing Act. The Court finds that Mr. Isakson's intentions have manifested themselves in his actions and that black people as a group have thereby been denied the protection guaranteed by the Act. This denial of protection is of sufficient public importance to authorize the relief herein granted."

We seriously doubt that the learned court below would have based its finding that appellants violated the Fair Housing Act on an unconstitutional ground, however, its opinion is ambiguous on this point. Certainly if the District Court did base its

decision that appellants violated the Fair Housing Act upon appellant Isakson's challenge to the constitutionality of the Fair Housing Act, its decision would be fatally infirm. Due process of law demands that a party not be penalized for exercising his right to raise the defense that the Act which he is being charged with violating is unconstitutional. United States v. Butler, 6 Cir. 1968, 389 F.2d 172, cert. denied, 1968, 390 U.S. 1039, 88 S.Ct. 1636, 20 L.Ed.2d 300; *cf.* Griffin v. California, 1965, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106. "Moreover, the First Amendment, which protects a controversial as well as a conventional dialogue, . . . extends to petitions for redress of grievances as well as to advocacy and debate." Whitehill v. Elkins, 1967, 389 U.S. 54, 57, 88 S.Ct. 184, 185, 19 L.Ed.2d 228, 231 (citations omitted).

Individuals accept the role of martyrs by defying laws to test their constitutionality, and if the laws are found to be constitutional the individual must accept the inexorable consequence, martyrdom; but our Constitution forbids that anyone should be found to have violated a law for opining that the law is unconstitutional. The proposition is too axiomatic to explicate that a person can express an opinion that a law is unconstitutional, and Isakson for a thousand times could have declared with impunity that the Fair Housing Act is unconstitutional, for these asseverations may not constitute proof of a violation. Isakson may well suffer the sanctions of law for what he did, for after reading this record, we do not find that the District Court was clearly erroneous in finding that appellants violated provisions of the Fair Housing Act; however, we want to remove any clouds of uncertainty and thus clear away all possibility of any miasma of dubiety. We know that the learned trial judge would not want us to wallow in doubt, and we cannot affirm if there is the slightest possibility that his decision rested upon a constitutionally impermissible ground. United New York and New Jersey Sandy Hook Pilots Asso. v. Halecki, 1959, 358 U.S. 613, 79 S.Ct. 517, 523, 3 L.Ed.2d 541; Street v. New York, 1969, 394 U.S.

576, 89 S.Ct. 1354, 22 L.Ed.2d 572; Chapman v. California, 1967, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705.[5]

The government correctly urges that if we ignore the District Court's statements concerning appellant Isakson's challenge to the validity of the Fair Housing Act, the District Court's finding that Isakson committed two post-Act violations is not clearly erroneous and would alone support the granting of injunctive relief. Appellants correctly urge that if the District Court made those findings of post-Act violations relying upon its drawing of unconstitutional inferences from Isakson's challenge to the Act, its order is fatally infirm and must be reversed. "In effect, the parties urge that we pick and choose to come to conclusions each asserts is required under the clearly erroneous concept. But this is not our role. It deprecates the function of the trial. Armed with the buckler and shield of F.R.Civ.P. 52(a), as findings come to us, we can perform our limited role only as we know with reasonable assurance just what the Judge has found." Mladinich v. United States, 5 Cir. 1967, 371 F.2d 940, 942 (citations omitted). Since we are unable to ascertain either the principle of law the District Court applied or the constitutional propriety of its fact findings, we think that justice demands that we remand this case to the District Court for a reconsideration of the facts in light of this opinion and for new conclusions of law.

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[5] Appellant also urges that the District Court failed to make findings with respect to material issues required by Rule 52(a) Fed.R. Civ.P. because it failed to specifically comment on all of the evidence adduced by appellants. In light of our disposition of this matter we think it suffices to note that "Courts need not indulge in exegetics, or parse or declaim every fact and each nuance and hypothesis," Gulf King Shrimp Co. v. Wirtz, 5 Cir. 1969, 407 F.2d 508, 516, and that "there is absolutely no indication that the trial court did not consider the evidence that appellants claim was ignored. All of the facts were admitted into evidence and the trial court's failure to mention each and every specific item in its memorandum opinion in no way indicates that they were not considered, weighed, and rejected as inconclusive." Ramey Const. Co., Inc. v. Local Union No. 544, 5 Cir. 1973, 472 F.2d 1127.

The record could support findings and conclusions of law that justify equitable relief, but we must be able to read such findings clearly and distinctly. The trial court's findings are only clearly erroneous if they were based (1) on a belief that Isakson's claimed intention to test the constitutionality of the Fair Housing Act showed an intent to violate the Act, or (2) on the finding that the Bowers incident standing alone evidenced a pre-Act pattern or practice. We must be absolutely certain that the trial court's findings were not tainted by a belief that Isakson's challenge to the constitutionality of the Act was probative of an intent to violate the Act. If this theory prevailed, no one could verbalize constitutional rights or theories. If the trial court found a violation because of Isakson's constitutional opinionativeness, this finding is repugnant to the First Amendment. We are constantly vigilant lest the non-conformist be chilled in the expression of ideas, and we must be just as watchful of any ideational concept, regardless of its source or content.

We recognize that the specificity and exactitude of a blueprint is not essential to findings of a violation of the Act. We remand for clarity to be certain that Isakson's public declaration of a constitutional opinion did not become the basis for a finding of a violation and that the trial court's decision was thus not sullied by an impermissible inference. Therefore, in reconsidering its order, the District Court may not consider appellant's challenge to the constitutionality of the Fair Housing Act as probative of a violation of the Act. If it again finds that appellants' activities violate the Act, it should then grant injunctive relief only upon a finding that appellants participated in a pattern or practice of violating the Act or upon a finding that appellants have denied a group of persons rights granted by the Act. We express no opinion as to the appropriate determination of this matter on remand. We merely direct the District Court to enter fresh findings of fact and conclusions of law not inconsistent with this opinion.

Remanded.

United States Court of Appeals
for the Fifth Circuit

October Term, 1972

No. 72-2151

D. C. Docket No. CA 13932

United States of America,
Plaintiff-Appellee,
versus
Northside Realty Associates, Inc.,
and Ed A. Isakson
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Georgia

Before GEWIN, GOLDBERG and DYER, Circuit Judges.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that this cause be, and the same is hereby remanded to the said District Court with directions in accordance with the opinion of this Court;

It is further ordered that plaintiff-appellee pay to defendants-appellants the costs on appeal to be taxed by the Clerk of this Court.

March 14, 1973

Issued as Mandate: Apr. 5, 1973

C.A. 13932

Order Making the Mandate the Judgment of the U. S. District Court

Mandate of the U. S. Court of Appeals read and considered.

IT IS ORDERED that the mandate be and it hereby is made the judgment of this court this 8th day of May, 1973.

/s/ WILLIAM C. O'KELLEY
U. S. DISTRICT COURT

United States District Court
Northern District of Georgia
Atlanta Division

United States of America
vs.
Northside Realty, et.al.
} Civil Action No. 13932

ORDER OF THE COURT WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case is again before the Court for findings of fact and conclusions of law. The Court, on December 29, 1971, entered an Order finding that the defendants had denied rights secured under the Fair Housing Act of 1968, to persons protected thereby and that this denial raised an issue of general public importance. The defendants were enjoined by that Order from further racial discrimination and ordered to take certain affirmative steps as set forth in that Order to correct the effects of the defendant's discriminatory practice. The case is cited at the trial level as *United States v. Northside Realty Associates, et al.*, P.H.E.O.H. Reporter ¶ 13,552 (N.D. Ga., 1971). The case is now before the Court pursuant to the remand by the United States Court of Appeals for the Fifth Circuit for the purpose of this Court clarifying its previous opinion so that the appellate court may ascertain whether or not this Court's injunction was issued on improper grounds. *United States v. Northside Realty Associates, et al.* — F.2d — (5th Cir. 1973).

Subsequent to the remand, counsel for the parties were directed to file memorandum of authorities with the Court as to the action which should be taken by the Court. At that time,

the defendants filed a brief upon remand and a request for referral to the Attorney General for determination of reasonable cause and a request that there be a substitution of parties or that in the alternative the case be dismissed.

The basis for the request of the defendants is due to the appointment of a new Attorney General. At the time the case was filed, the Attorney General of the United States was John Mitchell, whereas, at this time, the Attorney General of the United States is Elliot Richardson. As will be noted, the Attorney General himself is not a party to this litigation. The plaintiff is the United States of America, represented by the Attorney General. The action is filed only pursuant to a determination of reasonable cause made by the Attorney General. 42 U.S.C.A. § 3613. The Attorney General who made that determination was the one then in office. That determination having been made, there is no further necessity for re-referral to the Attorney General for a new determination of reasonable cause, nor is there a necessity for a substitution of parties.

WHEREFORE, the defendant's request for referral to the Attorney General for determination of reasonable cause and request that there be a substitution of parties or the case be dismissed, are each hereby DENIED.

In view of the denial of these requests, the plaintiff's motion to amend the Court's Order of June 15, 1973, to allow the plaintiff to respond to defendants' new motions, is moot.

Discussion

This Court in its previous order did not intend to attach major importance to the proposition that defendants' discriminatory conduct toward the Bowers family constituted a pre-Act *pattern or practice*, as distinguished from evidence of discrimina-

tion generally. The evidence of that pre-Act discrimination, whether or not it amounts to a "pattern or practice," is admissible to shed light on the character of post-Act conduct of the defendant. The defendants' pre-Act treatment of the Bowers was similar to their treatment of the Detroit professor and therefore sheds light on the character of that transaction, and is admissible for that purpose, irrespective of whether or not, standing alone, that incident constitutes a pre-Act pattern or practice.

The Court also notes that, since the entry of its initial Order, the Court of Appeals has affirmed Judge Pittman's decision in *United States v. Reddoch*, P.H.E.O.H. Rptr., ¶13,569 (S.D. Ala. 1972), *aff'd per curiam* 467 F.2d 897 (5th Cir. 1972), in which it is stated:

> "In cases of racial discrimination, statistics often tell much and courts listen. *State of Alabama v. United States*, 304 F.2d 583, 586 (5th Cir.), *aff'd* 371 U.S. 37 (1972). Nothing is as emphatic as zero." *United States v. Hinds County Board of Education*, 417 F.2d 852, 858 (5th Cir. 1969).

It has been held in recent housing discrimination cases that statistical evidence of this kind makes out, at least, a *prima facie* case of racial discrimination. *United States v. Housing Authority of City of Albany*, P.H.E.O.H. Rptr., ¶13,580 (M.D. Ga. 1973 (Elliott, J.); *United States v. Real Estate Development Corp.*, 347 F.Supp. 776 (N.D. Miss. 1972) (Smith, J.). While the Court of Appeals observed in its opinion in this case that one pre-Act incident *"standing alone and without a finding of any other factors"* does not constitute a pre-Act pattern or practice, this Court believes that the weight to be given to such a single incident is greater when viewed in the light of the statistics of many thousands of pre-Act sales, and none to a black. This is particularly significant in view of the fact that the defendant is one of the largest residential real estate companies in Atlanta.

In holding that Mr. Isakson's statements, as well as his conduct, indicated a disposition not to obey the Act, this Court did not intend to infer that the defendant violated the law by challenging that law. In regard to Isakson's speech before the DeKalb Women's Real Estate Council in the spring of 1970, this Court found that:

> "At that meeting, Mr. Isakson told the audience that while talking to this black caller, he told the caller that he did not sell real estate and that he had not sold real estate since March 23, 1960. He held this method out as a model for white real estate salespeople who did not wish to deal with blacks."

This Court concluded that "one may not be allowed to use such half-truths to avoid the purposes of the Fair Housing Act." This Court was of the opinion that this conduct by Isakson constituted an extrajudicial admission of a discriminatory policy which required injunctive relief to correct.

The Court recognizes that Mr. Isakson has a right to challenge the constitutionality of the Act, and that no inference adverse to defendants is to be drawn from Mr. Isakson's exercise of that right. The Court agrees that the language in its original opinion could have been clearer, but specifically finds that plaintiff was entitled to relief without regard to Isakson's statement about constitutionality.

In light of the foregoing, the Court now enters the following revised Findings of Fact and Conclusions of Law to implement the mandate of the Court of Appeals.

Findings of Fact

Northside Realty Associates, Inc., is incorporated under the laws of the State of Georgia and is licensed to engage in the listing and selling of real estate. Its executive vice-president,

Ed Isakson, is also the sales manager for one of the Company's seven residential sales offices. Mr. Isakson is a licensed broker, and it is his broker's license that inures to the benefit of the Company. The parties have stipulated, however, that Mr. Isakson personally has neither advertised, shown, nor sold any residential property since March 23, 1960.

In the Atlanta area Northside maintains nine offices, each under the supervision of a sales manager-associate broker (except for the Buckhead office which is directly supervised by the defendant, Ed Isakson). Seven of these offices are engaged in the sale of residential property. All of the offices are located in the northeastern and northwestern areas of the suburban metropolitan Atlanta area. Approximately 165 saleswomen are associated with and licensed under Northside Realty.

Northside, through its salespeople and brokers, acts as agent for listing sellers by presenting offers on behalf of potential buyers. Commissions are paid by the sellers when sales are consummated. The majority of such sales involve single family dwellings while a smaller proportion involve lots and multiple dwellings or commercial property.

In the three years since the effective date of the Fair Housing Act, not a single one of the more than 3,000 homes sold by Northside has been sold to a Negro. It is undisputed that prior to the filing of this action no single family homes were sold to blacks through the services of Northside either before or after the 1968 Act.

Sometime between February and May, 1968, a black couple named Bowers visited Northside's Buckhead office and talked with defendant Ed Isakson. Mr. Bowers' purpose in going to the Northside office was to investigate an advertised listing for an $18,000 to $18,500 home. After learning the amount of Mr. Bowers' salary, Mr. Isakson told the Bowers that they

could not afford an $18,000 house and referred them to a Negro-owned southwest Atlanta real estate firm. Mr. Isakson made no attempt to inquire of his agents whether Northside had any available listing within Mr. Bowers' price range, nor did he make the usual inquiries into Mr. Bowers' financing capabilities.

In the spring of 1970, defendant Isakson received a telephone call from a man recently transferred to Atlanta from Detroit. The caller stated that he was a black professor at one of the black colleges, and that he wanted to buy a house advertised by Northside. Mr. Isakson responded by saying that he had no houses advertised and that the caller's "interest would be best served" if he contacted another real estate company that sold primarily in the southwest Atlanta area.

Mr. Isakson related the Detroit professor incident to a meeting of the DeKalb Women's Real Estate Council held later in the spring of 1970. At that meeting, Mr. Isakson told the audience that while talking to this black caller, he told the caller that "he did not sell real estate, and that he had not sold real estate since March 23, 1960." He held this method out as a model for white real estate salespeople who did not wish to deal with blacks.

The Reverend Sam Williams telephoned Mr. Isakson concerning Mr. Isakson's conversation with the unnamed black professor from Detroit. When confronted with allegations of discrimination, Mr. Isakson failed to deny them.

Mr. Harold Dawson, a black real estate broker, who is a member of the City Planning Commission and a former president of the Empire Real Estate Board, made a telephone call to defendant Isakson in the course of business in 1970. During their conversation, Mr. Dawson asked if Mr. Isakson could help him with a client. Mr. Isakson reminded Mr. Dawson of his

involvement in this lawsuit, and indicated that he "would be in a better position" to assist Mr. Dawson at some later date. This Court finds that the manner in which Mr. Isakson made reference to the pendency of this lawsuit discouraged Mr. Dawson from continuing the conversation and showed that Mr. Isakson did not treat a Negro broker's offer to "co-op" in the same manner he would have treated such an offer from a white broker. Furthermore, this Court finds that Mr. Isakson's statements evidenced an intention not to cooperate with a black real estate broker unless ordered to do so by a federal court.

Mrs. Patricia D. Randolph, a licensed real estate agent in Atlanta, testified that in June of 1970, she contacted Mrs. Katherine Gribble, a Northside agent, to "cooperate" in showing one of her listings to a white client of Mrs. Randolph's. Mrs. Randolph claims that during their conversation Mrs. Gribble asked if Mrs. Randolph's client was black, and after being told that he was not, Mrs. Gribble volunteered that if she knew a potential client was black, she would fail to show up for any appointment with them. Mrs. Randolph further stated that Mrs. Gribble later showed Mrs. Randolph and her client the house inquired about and at that time gave Mrs. Randolph her business card. Mrs. Randolph produced this card during the trial. When placed on the witness stand, Mrs. Gribble testified that she had no knowledge of ever having talked with Mrs. Randolph. She also contended that she had never made an appointment with a black person that she did not keep, and that she had served to the best of her ability the only black person who had ever contacted her. From the testimony given by these two women, the Court finds that even if this incident occurred as Mrs. Randolph described, it represented only a spontaneous statement of an agent describing her own conduct and not describing the policy of the company or defendant Isakson.

Mrs. Amaryliss Hawk, an assistant professor of speech at a local black college, testified that she called Northside Realty on

June 2, 1970, and after asking for the sales manager, was connected with Mr. Isakson. She was quite certain of the date of the call as she had gone to the hospital later that same evening and delivered her third child. Mrs. Hawk claims she told Mr. Isakson that she was interested in a four-bedroom house in Area 1 (an area in which Northside sells property) in the $35,000 price range. After a brief, cordial conversation, Mrs. Hawk allegedly told Mr. Isakson that she was black. At this point, Mr. Isakson purportedly said he could not help a black family, but that he could recommend the names of two other real estate companies which would help her. Mr. Isakson denied ever having talked with Mrs. Hawk and further proved that he was not in Atlanta on June 2, 1970. From the evidence presented, Mr. Isakson proved to the satisfaction of the Court that on June 2, 1970, he was in Valdosta, Georgia, on business, and that he was not in his Atlanta office at anytime that day. The Court finds that since Mr. Isakson was in Valdosta, Georgia, with Mr. John McTier, a Valdosta attorney, on June 2, 1970, Mrs. Hawk could not have had any conversations with him on that date. Therefore, the Court finds that if such a conversation did in fact take place, it must have occurred on some date other than June 2, 1970. The Court, however, is unable to assume that Mrs. Hawk had this conversation with Mr. Isakson on some date other than June 2, 1970, because of Mrs. Hawk's definite testimony as to the date on which she made the call. From the evidence presented, the plaintiff did not prove to the Court that Mrs. Hawk's alleged talk with Mr. Isakson did in fact take place.

The actions of the defendants and their agents described above could have no other effect than to convey the unequivocal message to the Negro community, the real estate community, and the Northside sales staff that Northside did not intend to make its listings and services available to black persons.

CONCLUSIONS OF LAW

Section 813, 42 U.S.C.A. §3613 of the Fair Housing Act places the burden of proof upon the United States to show by a preponderance of the evidence that the defendants have either engaged in a "pattern or practice of resistance" to rights granted under the Act, or have denied rights secured by the Act to a group of persons, where such denial raises an issue of general public importance. *United States v. West Peachtree Tenth Corp.*, 437 F.2d 221 (5th Cir. 1971); *United States v. Mitchell*, 327 F.Supp. 476, 481-484 (N.D.Ga. 1971); *United States v. Bob Lawrence Realty, Inc.*, 327 F.Supp. 487, 492-498 (N.D. Ga. 1971). The Court of Appeals has held in this case that the Attorney General's determination of general public importance is conclusive and not subject to review by this Court, Slip opinion, p. 8. The question before this Court is whether the plaintiff has met the burden required.

The Bowers Incident

It appears to the Court that Mr. Isakson treated the Bowers in a discriminatory manner. It was admittedly abnormal for Mr. Isakson to deal directly with "walk-in" customers, since Isakson himself stated that he never handles would-be purchasers unless there is no other sales person in the office. Further, it would seem abnormal for a veteran real estate salesman: (1) to fail to discover the buyer's total financial potential before determining what priced house the buyer could afford; (2) to deny that the company had any houses listed within the price range of the potential buyer without consulting the listing book or the agents in the office; and (3) to refer a potential buyer to another real estate company without "co-operating" or receiving a referral fee. Furthermore, Mr. Isakson stated in his deposition that he had never referred a white buyer to

a black real estate broker as he did Mr. Bowers. In short, Mr. Isakson treated the Bowers in a different manner than he would have treated white customers.

Although the Bowers' incident occurred prior to the effective date of the Act, it is relevant to this case in that it "shed[s] light on the true character" of matters occurring after the effective date of the Act. *Machinists Local No. 1424 v. N.L.R.B.*, 362 U.S. 411, 416 (1960). In *FTC v. Cement Institute*, 333 U.S. 683, 705 (1948), the Supreme Court made the test of admissibility whether such evidence tends "reasonably to show the purpose and character of the particular transaction under scrutiny." The similarity between the Bowers incident and the Detroit professor incident indicates that the latter was not fortuitous or a-typical, and this is reinforced by the emphatic statistical evidence of zero sales to blacks before or after the Act. *United States v. Reddoch, supra.*

The Detroit Professor Incident

Although the events surrounding the phone call from the Detroit professor are vague due to the anonymity of the caller, Mr. Isakson's own testimony is sufficient to show the Court that he treated this caller in a different manner than he would have treated a white caller. The defendant Isakson went through none of the usual procedures for qualifying this customer in terms of income or geographical area desired, but rather referred him immediately to two other real estate companies which sold primarily to blacks. Mr. Isakson stated that he made this referral because he felt that this client's interest would "best be served" by going elsewhere. Such subjective standards which result in blacks not being served or admitted are inherently suspect. *United States v. West Peachtree Tenth Corporation, supra; United States v. Sheet Metal Works*, 416 F.2d 123 (8th Cir., 1969). Once again, Mr. Isakson referred a black to an-

other company without "co-operating" or claiming a referral fee. This fact alone is unusual for one engaged in a commercial venture to make a profit.

It is undisputed that Mr. Isakson told the black professor that he, himself, "did not sell houses" and further, that he had not advertised any houses in the previous day's newspaper. It appears that Mr. Isakson made these statements without making it clear that although Mr. Isakson, himself, did not sell or advertise houses, Northside Realty did both. One may not be allowed to use such half-truths to avoid the purposes of the Fair Housing Act. Failure to give a Negro adequate information or aid when such information or aid is ordinarily given to whites has been held to be discriminatory conduct. *United States v. West Peachtree Tenth Corp., supra; United States v. Reddoch, supra.*

Conversation With Mr. Dawson

In his conversation with Mr. Dawson, Mr. Isakson showed that he did not treat a Negro broker's offer to "co-op" in the same manner he would have treated such an offer from a white broker. The manner in which Mr. Isakson made reference to the pendency of this suit discouraged and, in fact, ended their conversation. Furthermore, this reference could have had little other meaning than to suggest that Mr. Isakson would not "co-operate" with any black realtor unless ordered to do so by this Court. This Act of discrimination constitutes a violation of § 804(a) of the Fair Housing Act, 42 U.S.C. § 3604 (a) since Section 804(a) makes it unlawful to make a dwelling unavailable to any person on account of race.

The Fair Housing Act should be given a liberal construction to accomplish the purpose of eliminating racial discrimination. In this regard, the Act prohibits subtle, as well as, more obvious

forms of discrimination, and courts should look to each transaction in its entirety to prevent indirect, as well as, direct methods of discrimination. Therefore, this Court will not allow Mr. Isakson and Northside Realty to circumvent the purposes of the Act by the methods used in Mr. Isakson's dealings with the Bowers, Mr. Dawson, and the Detroit professor.

The Court takes note that the government filed this case and presented it with little evidence to support its position that the defendants were engaged in a pattern or practice of discrimination. At the time suit was filed, the government's case consisted of one pre-Act incident and one post-Act incident (which later failed of proof). Mr. Isakson's own actions and admissions, however, especially his speech before the DeKalb Women's Real Estate Council, in which he boasted of his "subtle" evasion of the Act, indicate his intention on behalf of himself and the company to resist compliance with the purposes of the Fair Housing Act. Since this Court's original opinion in this case, the Court of Appeals has affirmed a holding that extrajudicial admissions of a discriminatory policy, standing alone, support relief under 42 U.S.C. § 3613. *United States v. Reddoch*, 467 F.2d 897 (5th Cir. 1972), *aff'd per curiam* P.H.E.O.H. Rptr. 13569 (S.D. Ala. 1971); see also, *United States v. Real Estate Development Corp.*, 347 F.Supp. 776, 7 (N.D. Min. 1972). The Court finds that Mr. Isakson's intentions have manifested themselves in his actions and that black people as a group have thereby been denied the protection guaranteed by the Act. This denial of protection is of sufficient public importance to authorize the relief herein granted.

INJUNCTION

NOW THEREFORE, pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS ORDERED, ADJUDGED AND DECREED that the defendants Northside Realty Asso-

ciates, Inc., Ed A. Isakson, all the corporate defendant's officers, employees, brokers, agents and all persons in active concert or participation with any of them are enjoined from:

(1) Failing or refusing to negotiate for the sale of any dwelling, and from making any dwelling unavailable to any person because of race, color, religion, or national origin;

(2) Discriminating against any person in the terms, conditions, or privileges of purchase of a dwelling, or in the services or facilities connected with such sale or purchase or with real estate brokerage, because of race, color, religion or national origin;

(3) Representing, explicitly or implicitly, to any person because of race, color, religion or national origin that any dwelling is unavailable for sale or inspection when such dwelling is, in fact, available;

(4) Discriminating against any person or persons on account of race, color, religion or national origin with respect to engagement of his services by defendants or any of them;

(5) Failing or refusing to cooperate with any broker or any representative of any corporate or individual broker, with respect to the sale or negotiation for sale of any dwelling, because of the race, color, religion, or national origin of the broker, the salesperson, or the client on whose behalf such available dwellings are being sought, or because of racial occupancy patterns in any place or area.

IT IS FURTHER ORDERED that the defendants shall forthwith adopt and implement the following affirmative program to assure nondiscriminatory treatment of Negroes and to correct the effects of their past discriminatory practices and image:

(1) The defendants shall, within 30 days of the entry of this Order, conduct an educational program for its sales personnel

and other agents and employees to inform them of the provisions of this decree and their duties under the Fair Housing Act. Such a program shall include the following:

(a) A copy of this decree shall be furnished to each salesperson and other employee;

(b) By general meeting or individual conference, the defendants shall inform each salesperson and other employee of the provisions of this decree and of the duties of the company and its agents and employees under the Fair Housing Act.

(2) Throughout the calendar years 1972, 1973, and 1974, the defendants shall maintain separate records on each inquiry from potential buyers and/or sellers who are identified or are identifiable as members of the Negro race. Each record should include the following information:

(a) the inquirers name;

(b) the services requested or desired;

(c) the services actually rendered;

(d) the name of the person and the office handling the inquiry or transaction;

(e) the date of the initial inquiry;

(f) the date the service, if any, was rendered;

(g) if no service was rendered, the reason therefor.

The defendants shall maintain these records as permanent files of the company for three years from this date unless further ordered by this Court. Furthermore, the defendants shall make these records available for inspection by a representative of the Attorney General of the United States at six-month intervals during 1973 and 1974.

By entry of this Order, the Court is determining rights of the parties as of December 29, 1971. Either party is free to petition for further relief based on events which have occurred since that date.

It Is So Ordered this 25th day of September, 1973.

/s/ WILLIAM C. O'KELLEY
WILLIAM C. O'KELLEY
United States District Judge

United States of America,
Plaintiff-Appellee,

v.

Northside Realty Associates, Inc., et al.,
Defendants-Appellants.

No. 74-1414

Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

Sept. 23, 1974.

Before BROWN, Chief Judge, and THORNBERRY and AINSWORTH, Circuit, Judges.

PER CURIAM:

The United States brought this action in July, 1970, against Northside Realty and its executive vice-president, Ed. Isakson, alleging that defendants had refused to make housing available to Blacks on account of race in violation of the Fair Housing Act, 42 U.S.C. § 3601 et seq. The district court found defendant in violation of the Act and granted injunctive relief. From the district court's findings of fact and conclusions of law, we were unable to ascertain whether the determination that the Act had been violated was based on the impermissible ground that Isakson challenged the Act [sic] constitutionally. We remanded for clarification and directed the district court to enter fresh findings of fact and conclusions of law. *United States v. Northside Realty Associates, Inc.*, 5 Cir., 1973, 474 F.2d 1164. The district court has now complied with our request and has

specifically found, without regard to Isakson's statements about constitutionality, that the United States is entitled to relief.

Defendants appeal to us once again raising four assignments of error. We find these contentions to be without merit and affirm.

Defendants contend that the lower court's determination that the Government carried its burden of proving an issue of public importance is erroneous. They also contend the district court's findings were clearly erroneous and reflected no consideration of essential uncontroverted material facts. They further assert that the grant of injunctive relief was an abuse of discretion. These assignments of error were fully explored the first time this case reached us. We adhere to our position that the question of what constitutes an issue of general public importance is, absent specific statutory standards, a question most appropriately answered by the executive branch. *Northside, supra,* at 1168. Further, we held that the district court was not clearly erroneous in finding that defendants violated the act and that the violations, absent Isakson's challenge to the validity of the Act, would alone support the granting of unjunctive [sic] relief. *Northside, supra,* at 1170-1171.

Defendants complain that the district court erred, after remand, in refusing to refer this case to the Attorney General for another determination of whether "reasonable cause" existed pursuant to 42 U.S.C. § 3613 because the allegations available to the Attorney General in office when the first complaint was issued failed of proof or were found not to support the relief sought. In view of our holding that the district court found facts sufficient to support a violation of the Act, we find no merit in defendants' final contention.

Affirmed.

United States Court of Appeals
Fifth Circuit
Office of the Clerk

October 25, 1974

Edward W. Wadsworth
Clerk

Room 408—400 Royal St.
New Orleans, La. 70130

TO ALL COUNSEL OF RECORD

No. 74-1414—USA vs. Northside Realty Associates, Inc., et al.

Dear Counsel:

The Court has directed that the parties file additional briefs discussing the precedence concerning the statute here, 42 USC § 3613, and others on the reviewability by the court of administrative rulings. These simultaneous briefs are to be filed within fifteen (15) days from this date. Responses may then be filed within seven (7) days from service of the additional briefs.

Very truly yours

EDWARD W. WADSWORTH
Clerk

By RICHARD E. WINDHORST; JR.
Chief, Judicial Support Division

Messrs. Harold L. Russell
Lloyd Sutter

Messrs. William B. Saxbe
Jerris Leonard

Messrs. Frank E. Schwelb
David T. Kelley

Messrs. Harold H. Moore
J. Stanley Pottinger

Messrs. John W. Stokes, Jr.
Julain M. Longley, Jr.

Mr. Thomas N. Keeling

United States Court of Appeals
Fifth Circuit
Office of the Clerk

October 29, 1974

Edward W. Wadsworth
Clerk

Room 408—400 Royal St.
New Orleans, La. 70130

TO ALL COUNSEL OF RECORD
No. S74-1414—USA vs. Northside Realty Associates Inc., et al.

Dear Counsel:

Supplementing our previous letter of October 25, 1974, the additional briefs should discuss the relevant Fifth Circuit cases under the civil rights statutes that involved determinations by the Attorney General.

Very truly yours
EDWARD W. WADSWORTH
Clerk
By RICHARD E. WINDHORST, JR.
Chief, Judicial Support Division

Messrs. Harold L. Russell
Lloyd Sutter

Messrs. William B. Saxbe
Jerris Leonard

Messrs. Frank E. Schwelb
David T. Kelley

Messrs. Harold H. Moore
J. Stanley Pottinger

Messrs. John W. Stokes, Jr.
Julian M. Longley, Jr.

Mr. Thomas N. Keeling

United States of America,
Plaintiff-Appellee,

v.

Northside Realty Associates, Inc., et al.,
Defendants-Appellants.

No. 74-1414.

United States Court of Appeals,
Fifth Circuit

Sept. 4, 1975

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion September 23, 1974, 5 Cir., 1974, 501 F.2d 181)

Before BROWN, Chief Judge, and THORNBERRY and AINSWORTH, Circuit Judges.

JOHN R. BROWN, Chief Judge:

In a spirited Petition for Rehearing and Rehearing En Banc, the Appellant principally argues that *United States v. Northside Realty Associates, Inc.*, 5 Cir., 1974, 501 F.2d 181 (*Northside II*) and *United States v. Northside Realty Associates, Inc.*, 5 Cir., 1973, 474 F.2d 1164 (*Northside I*) conflict with the intervening decision of this Court in *United States v. Pelzer Realty Co.*, 5 Cir., 1973, 484 F.2d 438. But in no sense does the Petition for Rehearing—and more important the supporting brief—stop there.

While we understand Appellant's concern regarding the disposition of this case, we are struck by counsel's excessive lan-

guage in Appellant's brief on petition for rehearing, riddled as it is with inaccuracies.

First, Appellant asks that

> *somebody* examine the facts of this case and make a considered judgment on the question whether there has been a denial of rights raising an issue of general public importance.[1] The district court did not do it; this court *did not do* it; and no Attorney General has done it.
>
> [1] No claim is made that there was a "pattern or practice of resistance" (42 U.S.C. § 3613) which could justify issuance of an injunction against the defendants.

(Petition for Rehearing Brief for Appellant at 2, *Northside II*).

Contrary to Appellant's statement above, the Government did in fact claim a "pattern and practice of resistance" and therefore asks for an injunction.[1] Further, the District Court's Order of December 30, 1971 specifically held that a group of people had been denied the protection of the Fair Housing

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[1] The Government's complaint alleged that

6. The acts and practices described in the preceding paragraphs constitute:

(a) a pattern or practice by the defendants of resistance to the full enjoyment of rights secured by Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601, et seq.; and

(b) a denial to groups of persons of the rights granted by Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601, et seq., which denial raises an issue of general public importance.

* * * * * * *

WHEREFORE, the plaintiff prays that the Court enter an Order

1. Enjoining the defendants, their employees, agents and successors, and all those acting in concert or participation with any of them, from engaging in any racially discriminatory housing practice, and

Northside I, 474 F.2d 1164.

Act as claimed by the Government and an injunction was appropriate.[2]

This Court also recognized that the Government sought injunctive relief and claimed a pattern and practice of resistance to the Fair Housing Act, thus raising an issue of general public importance. *Northside I*, 474 F.2d at 1165. And, except for the infection of the unconstitutional "penalty" on the realtor for obdurate opposition to the Act, we stated that the finding was amply supported, and we remanded for a further explanation of the reasons for a finding of discrimination and whether they were tainted by this impermissible burden.[3]

On remand the District Court clarified its original opinion to specifically hold that Northside's Vice-President Isakson's challenge to the constitutionality of the Fair Housing Act was not a consideration in its finding of a violation of the Act, and that its decision stood on more than the single incident with Bowers—that the Bowers pre-Act incident was used to highlight the similarity to other discriminatory incidents that followed. Supplemental Appendix at 14, *Northside II*.

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[2] The District Court concluded that black people as a group have thereby been denied the protection guaranteed by the Act. This denial of protection is of sufficient importance to authorize the relief herein.

Northside I.

[3] We held, with Judge Goldberg writing for the Court, that the record could support findings and conclusions of law that justify equitable relief, but we must be able to read such findings clearly and distinctly. The trial court's findings are only clearly erroneous if they were based (1) on a belief that Isakson's claimed intention to test the constitutionality of the Fair Housing Act showed an intent to violate the Act, or (2) on the finding that the Bowers incident standing alone evidenced a pre-Act pattern or practice. We must be absolutely certain that the trial court's findings were not tainted by a belief that Isakson's challenge to the constitutionality of the Act was probative of an intent to violate the Act.

Northside I, supra, 474 F.2d at 1171.

When appealed to this Court for the second time, we reviewed the District Court's new order and determined that the District Court had complied with the guidelines in our earlier opinion, see note 3, *supra*, and therefore affirmed the decision. *Northside II*, *supra*, 501 F.2d at 182.

In language reflecting an unfortunate absence of professionalism, counsel for appellant next inveighs against our failing to mention and follow a Fourth Circuit opinion holding that the Government must prove discrimination of general public importance before granting injunctive relief.[4] Perhaps counsel is not aware that this Court is bound only by decisions of this Circuit and the Supreme Court of the United States. However, in this instance, counsel has been doubly wrong since we have in fact even complied with the standards of the Fourth Circuit for the District Court recognized that the Government had the burden of proof in showing a violation of the Fair Housing Act.[5] Moreover, *Hunter* is of little help to appellant's argument. In that case, the Fourth Circuit held two isolated, allegedly discriminatory acts insufficient to establish a pattern or practice of resistance. 459 F.2d at 217. Nonetheless, the *Hunter* Court held that, under the same facts, the Government "clearly" had established its right to bring the case as raising an issue of general public importance. 459 F.2d at 217-218.

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[4] Petition for Rehearing Brief at 3, *Northside II*:

> In *United States v. Hunter*, 459 F.2d 205 (4th Cir. 1972), the court held that the Government must *prove* a denial raising an issue of general public importance as a *predicate* for the grant of injunctive relief (459 F.2d at 217). * * * We have, at every opportunity, brought *Hunter* to the Court's attention. It is not important that counsel, in our frustration, are edged near the belief that one could practice in this Circuit without a library; it is important, however, that the defendants are unlawfully put upon by the failure to examine the facts in the light of the law and, for that reason, rehearing should be granted.

[5] The District Court stated that the "question before this Court is whether the plaintiff has met the burden required." Supplemental Appendix at 13, *Northside II*.

Hunter thus is of little solace to a party arguing that even though a violation of the Fair Housing Act has been established, the issue is still not one the Attorney General might deem to be of public importance. After an examination of the facts, the District Court then determined that the burden had been met and held that this "denial is of sufficient public importance to authorize the relief herein granted." Supplemental Appendix at 17, *Northside II*. And one relief specifically listed for violations of the Fair Housing Act is an injunction.[6]

Appellant next asserts that inconsistencies exist in our final opinion in *Northside II*, asserting that in one breath we state that what is an issue of public importance is within the discretion of the Attorney General, and in the other that it did not matter that the Attorney General had failed to make such a determination here.[7] The only inconsistency, however, seems

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[6] 42 U.S.C.A. § 3613 provides:

> Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by this subchapter, or that any group of persons has been denied any of the rights granted by this subchapter and such denial raises an issue of general public importance, he may bring a civil action in any appropriate United States district court by filing with it a complaint setting forth the facts and requesting such preventive relief, including an application for a permanent, or temporary injunction, restraining order, or other order against the person or persons responsible for such pattern or practice or denial of rights, as he deems necessary to insure the full enjoyment of the rights granted by this subchapter.
>
> Pub.L. 90-284, Title VIII, § 813, Apr. 11, 1968, 82 Stat. 88.

[7] Petition for Rehearing Brief at 3-4, *Northside II*:

> In connection with this point, it should also be noted that the per curiam decision, despite its brevity, is nonetheless inconsistent within itself. The order first says that "the question of what constitutes an issue of general public importance is . . . a question most appropriately answered by the executive branch." But when defendants pointed out that no attorney general had ever determined the facts found by the district court reflected

to be in counsel's misreading of what is actually there. We stated in both *Northside I & II* that the determination of what is an issue of public importance in order to bring an action under the Fair Housing Act is within the Attorney General's discretion. *Northside, supra,* 501 F.2d at 182, 474 F.2d at 1168. Appellant urges that whenever a new Attorney General is appointed, that person must re-examine every case for a fresh determination of public importance. As the District Court so ably reasoned,[8] such a position is without merit. Once a determination of public importance has been made by an Attorney General, the *Government* is the party and the case proceeds.

Here, a determination of public importance was made, a new Attorney General was appointed and the District Court found a violation of the Act. To ask for a fresh determination of probable cause by a new Attorney General after the District Court has already found a violation of the Act would be

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an issue of general public importance, the court said there was "no merit in defendants' final contention" that the Attorney General should make the finding. We are reminded of Justice Stewart's remark in *United States v. Von's Grocery Company,* 384 U.S. 270 [86 S.Ct. 1478, 16 L.Ed.2d 555] (1966), "The sole consistency that I can find is that in litigation under Section 7, the government always wins."

[8] Supplemental Appendix at 5, *Northside II, supra.* 501 F.2d 181:

The basis for the request of the defendants is due to the appointment of a new Attorney General. At the time the case was filed, the Attorney General of the United States was John Mitchell, whereas, at this time, the Attorney General of the United States is Elliot Richardson. As will be noted, the Attorney General himself is not a party to this litigation. The plaintiff is the United States of America, represented by the Attorney General. The action is filed only pursuant to a determination of reasonable cause made by the Attorney General. 42 U.S.C.A. § 3613. The Attorney General who made that determination was the one then in office. That determination having been made, there is no further necessity for re-referral to the Attorney General for a new determination of reasonable cause, nor is there a necessity for a substitution of parties.

entirely superfluous. Accordingly, we said in our former opinion that in "view of our holding that the district court found facts sufficient to support a violation of the Act, we find no merit in defendants' final contention." *Northside II, supra,* 501 F.2d at 182.

Finally, counsel, obviously piqued, begs *somebody* to look at the facts of the case and discover that the wholly innocent employees at Northside have been unjustly marred by having an injunction placed on them against violating the Fair Housing Act. Such an unfounded holding, Appellant [sic] goes on, supports a "belief" that the Court is so overburdened and overworked that it cannot properly dispense justice.[9] This is akin to another litigant's contention, labeled by us as "intemperate," that his case had not received careful consideration and scru-

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[9] Petition for Rehearing Brief at 5, *Northside II:*

> Defendants' second plea is that *somebody,* preferably this Court, but if not, the district court on remand, look at the facts as found by the district court and determine whether the two ancient incidents of alleged violation of the Fair Housing Act found by that court actually justify the issuance of any injunction, and particularly an injunction running against "officers, employees, brokers, agents" of Northside, several hundreds in number, who have spotless records of compliance with the law. Ordinarily, courts make findings as to the reasons why an injunction should issue. *United States v. W. T. Grant Co.,* 345 U.S. 629, 633, 73 S.Ct. 894, 97 L.Ed. 1303 (1953). Here no such findings have been made by anyone.
>
> This Court apparently does not appreciate the consequences of the injunction's effect on wholly innocent people. For example, if the injunction stands, how does a Northside Realty salesperson answer questions about this litigation when applying for a new job, or for credit, or for insurance? How does she explain that she is subject to a court order restraining her from violation of the Fair Housing Act? Who would believe that such orders are issued against innocent people? Who would believe her when she said the order ran against all associated salespersons even though not a single one of them had ever violated the law? This Court was created to correct errors adversely affecting innocent persons. Its inaction here reinforces the belief of many that the Court is so overworked and overburdened that it cannot effectively dispense justice and that the Circuit should be split into two circuits.

tiny by the Judges of the Court. See *George W. Bennett Bryson & Co., Ltd. v. Norton Lilly & Co., Inc.*, 5 Cir., 1974, 502 F.2d 1045, 1047.

But contrary to these charges this Court, while undoubtedly one of the Nation's busiest Courts, gives earnest consideration to every case, and certainly, as its history reflects, in the field of civil rights and race discrimination. Of course, in this travail we rely heavily on the quality of the briefs and arguments submitted by the attorneys.

We have twice looked at the evidence but to assure that no slight has been done either to the realtor or the law, we now review it a third time.

Northside has sold more than 3,000 homes since the effective date of the Fair Housing Act—none to a black person. And before this action was filed, no single family dwellings were sold to black persons. As we once said:

> ". . . figures of this kind, while not necessarily satisfying the whole case, have critical, if not decisive, significance—"

Rowe v. General Motors Corporation, 5 Cir., 1972, 457 F.2d 348, 358. But the zero does not stand alone in the evidence box.

Prior to the effective date of the Fair Housing Act, a Mr. Bowers—a black person—was turned away from Northside Realty by Vice-President Isakson with the statement that Mr. Bowers could not afford a house in a certain price range. Without showing housing in a price range he could afford, Mr. Isakson referred Mr. Bowers to a Negro-owned real estate firm in Atlanta.

Post-Fair Housing Act, Mr. Isakson indicated to a black college professor that he could not help him in finding a house and

referred him to another agency. Further, Mr. Isakson's statements to black realtor Harold Dawson indicated Mr. Isakson's unwillingness to cooperate or deal with black realtors and their clients. The record contains further evidence—detailed by the District Court—that Northside and its employees and agents have created an image and unwillingness to help black clients. The District Court had ample basis for concluding that Northside Realty, far from having "spotless records of compliance with the law," has violated the Fair Housing Act so as to require enjoining Northside from further violations of the Act. Moreover, the District Court could reasonably have determined that only by ordering compliance with the Act at all levels of Northside's operations could the Act's goals (and the injunction's aim) be effectuated.

The District Court's detailed order of January 19, 1972, this Court's detailed opinion of March 4, 1973 (*Northside I*), the District Court's meticulous findings and order of September 27, 1973, and finally this Court's opinion of September 23, 1974 (*Northside II*), demonstrate that not only has *somebody* examined the facts of this case, but that two panels of this Court as well as a District Judge have carefully examined the record and all appellant's contentions. We repeat what Judge Ainsworth stated for us in outlining the review procedure of this Court, "Full and meticulous consideration is given to all cases, whether summarily decided or orally argued." *George W. Bennett Bryson & Co., Ltd. v. Norton Lilly & Co.*, 5 Cir., 1974, 502 F.2d 1045, 1051.

With the facts thus so thoroughly considered, we turn to the question of whether *Northside I* and *II* conflict with *Pelzer*. In *Pelzer* the Court recognized that when there is a judicial testing of whether a pattern or practice actually exists and that before relief is actually granted, the Court must *of course* "exercise independent judgment" to determine whether the Government has proved its case. Based on these statements, Appellants argue

that the Court's opinions are inconsistent—that in the *Northside* opinions the Attorney General is given the very broad and independent power to bring the suit, while in *Pelzer* the Court suggests that that authority is not so independent and thus subject to judicial review.

Appellants fail to appreciate the nature of the cause of action pursued in the different cases, however, and based on that distinction, their arguments are unfounded. *Pelzer* was decided as a "pattern or practice" case,[10] on the issue of the review of the Attorney General's determination. *Northside*, on the other hand, is primarily a "denial of rights raising an issue of general public importance" case. Whatever the validity in pattern or practice cases of the distinction between (1) review of the Attorney General's decision to sue and (2) review of the sufficiency of the evidence on the merits, it makes little sense in this context. First, the same evidence will likely be used to demonstrate the Attorny General's reasonable cause to believe that a denial has taken place and to establish the actual denial. But that is also true, of course, in the pattern or practice cases. More importantly, the existence of a pattern or practice of discrimination may be discoverable using traditional judicial standards, but what constitutes an issue of general public importance is hardly susceptible of "proof" in the normal legal sense at all. Hence, the latter decision seems classically suited to the discretion of prosecuting authorities in the Executive Branch.[11]

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[10] It is true that the complaint filed by the Government specifically charges an unlawful pattern and practice and the District Court so found and which, apart from the infection of non-constitutional burdens on the objecting relator, we found supported by the evidence. *Northside I, supra* at 1171 (see notes 2 and 3, *supra*).

[11] *United States v. Bob Lawrence Realty Co.*, 5 Cir., 1973, 474 F.2d 115, 125 n. 14, *cert. den.*, 1974, 414 U.S. 826, 94 S.Ct. 131, 38 L.Ed.2d 59 (Fair Housing Act); *United States v. International Assn. of Iron Workers Local No. 1*, 7 Cir., 1971, 438 F.2d 679, 681-82, *cert. den.*, 1971, 404 U.S. 830, 92 S.Ct. 75, 30 L.Ed.2d 60 (reasonable cause to bring employment discrimination suit); *United States v. Gustin-Bacon Division, Certainteed Prods. Corp.*, 10 Cir., 1970, 426 F.2d 539, 543 (Civil Rights Act of 1964); *United States*

In any event, the dicta in *Pelzer* concerning our type of case suggests only that courts might review the Attorney General's determination of "whether there was reason to believe that a group of persons had been denied rights guaranteed by the Fair Housing Act." But it says nothing about reviewing his decision on the public importance of the alleged denial. Hence, our reaffirmation of *Northside I* creates no conflict with *Pelzer*.

We continue to hold that under 42 U.S.C. § 3613 what is an issue of general public importance is within the Attorney General's discretion. See note 6, *supra*. To the extent that the issue of pattern or practice is in the case, we continue to hold that our review of the matter shows that the District Court did not err in finding that the Attorney General could have reasonable cause to believe that a person or group of persons was engaged in a pattern or practice of violating the Fair Housing Act.

The Petition for Rehearing is denied and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is denied.

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v. Greenwood Municipal Separate School Dist., 5 Cir., 1969, 406 F.2d 1086, 1090-91 (reasonable cause to bring school desegregation suit); *Smith v. United States*, 5 Cir., 1967, 375 F.2d 243, 247 *cert. den.*, 1967, 389 U.S. 841, 88 S.Ct. 76, 19 L.Ed.2d 106 (criminal); *United States v. Cox*, 5 Cir., 1965, 342 F.2d 167, 171, *cert. den.*, 381 U.S. 935, 85 S.Ct. 1767, 14 L.Ed.2d 700 (criminal); *Kennedy v. Lynd*, 5 Cir., 1962, 306 F.2d 222, 226, *cert. den.*, 1962, 371 U.S. 952, 83 S.Ct. 507, 9 L.Ed.2d 500 (reasonable cause to inspect voting records); *Boyd v. United States*, E.D.N.Y., 1972, 345 F.Supp. 790, 794 (settlement of fair housing suit); *United States v. Gray, D.R.I.*, 1970, 315 F.Supp. 13, 22-24 (reasonable cause to bring public accommodations suit); *United States v. Mitchell*, N.D. Ga., 1970, 313 F.Supp. 299, 300 (Fair Housing Act); *United States v. Real Estate Development Corp.*, N.D.Miss., 1972, 347 F.Supp. 776, 784, n. 2 (Attorney General's determination of general public importance under 42 U.S.C. § 3613 not reviewable); *United States v. Reddoch* (No. 6541-71-P, S.D.Ala., Jan. 27, 1972), aff'd., 5 Cir., 467 F.2d 897 (same).

United States Court of Appeals
For the Fifth Circuit

October Term, 1973

No. 74-1414

Summary Calendar

D. C. Docket No. CA 13932

United States of America,

Plaintiff-Appellee,

versus

Northside Realty Associates, Inc., et al.,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Georgia

Before BROWN, Chief Judge, and THORNBERRY and AINSWORTH, Circuit Judges

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern Dis-

trict of Georgia, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that defendants-appellants pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

September 23, 1974

Issued as Mandate: Sept. 12, 1975

In the United States Court of Appeals
For the Fifth Circuit

No. 74-1414

Northside Realty Associates, Inc. and Ed A. Isakson,
Defendants-Appellants,

v.

United States of America,
Plaintiff-Appellee.

Appeal From the United States District Court for the
Northern District of Georgia
Atlanta Division

PETITION FOR REHEARING SO AS TO MAKE CORRECTIONS AND AMENDMENTS IN OPINION

HAROLD L. RUSSELL
4000 First National Bank Tower
Atlanta, Georgia 30303
Attorney for Defendants-Appellants

Atlanta, Georgia

September 17, 1975

Come now the Defendants-Appellants ("Northside") and file this Petition for Rehearing with respect to this Court's decision of September 4, 1975 ("Northside III"), which denied Northside's Petition for Rehearing of October 7, 1974, and in support of this petition show as follows:

BLEED THROUGH

Preliminary Statement

Northside will file a timely petition for certiorari with the Supreme Court and will not seek a stay of this Court's mandate because the lower court's Order herein has never been stayed. This petition provides this Court an opportunity to make required and desirable corrections and amendments in the Opinion of September 4, 1975.

I

Northside asks that the second paragraph of the Court's decision be amended to read as follows:

> While we understand Appellant's concern regarding the disposition of this case, we are struck by counsel's excessive language in the ~~Appellant's brief~~ on petition for rehearing, riddled as it is with erroneous characterizations ~~inaccuracies~~.*

The reasons for the requested changes are as follows:

(a) The language to which the Court refers in its Opinion does not appear "in Appellant's brief" [filed pursuant to the Court's request, see A. 43 and A. 44] but in the October 7, 1974, Petition for Rehearing.

(b) While the Court's criticism of certain language in the petition "as excessive" is wholly within the province of the Court, the statements labeled as "inaccuracies" are actually statements of opinion not wholly without basis as is shown in subsequent paragraphs of this petition.

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* In this petition, proposed deletions and additions in the Court's opinion are set out in the legislative style therefor with additions underscored and deletions stricken through.

2

Northside asks that the first sentence of the fourth paragraph of the Court's Opinion be modified to read as follows:

> Contrary to Appellant's statement above, the Government did in fact claim a "pattern and practice of resistance" and therefore asked ~~asks~~ for an injunction; however, Appellant is correct in noting that following the District Court's initial failure in its decision of December 29, 1971 to sustain the Government's allegations of pattern or practice of discrimination and the remand to the lower court in Northside I, the Government did not thereafter request any finding of a "pattern or practice of resistance."

In Northside's Petition for Rehearing, page 2, footnote 1, it was stated:

> No claim is made that there was a "pattern or practice of resistance" (42 U.S.C. § 3613) which could justify issuance of an injunction against the defendants.

Appellant's petition spoke as of October 7, 1974, saying "No claim *is* made" (emphasis added). At that time, no claim was being made by the Government of any "pattern or practice" of discrimination.

The District Court, in both of its opinions, held (J.A. 109; S.A. 13)*:

> The Court takes note that the government filed this case and presented it with little evidence to support its position that the defendants were engaged in a pattern or practice of discrimination. At that time the suit was filed, the government's case consisted of one pre-Act incident and one post-Act incident (which later failed of proof).

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* References to "A." and "S.A." are, respectively, to the appendices in *Northside I* and *Northside II*.

BLEED THROUGH

Likewise, in both of its opinions, the District Court held (J.A. 109-110; S.A. 14):

> The Court finds that Mr. Isakson's intentions have manifested themselves in his actions and that black people as a group have thereby been denied the protection guaranteed by the Act. This denial of protection is of sufficient public importance to authorize the relief herein granted.

Upon the appeal in *Northside I*, Northside maintained that the lower court had "held the Government failed to prove a 'pattern or practice' of discrimination by Northside or Mr. Isakson" (see Brief of July 5, 1972 at pp. 30-31) while the Government maintained the lower court had made no ruling on the issue (Government Brief of July 28, 1972, p. 2):

> On December 30, 1971, the [District] Court issued an Opinion and Order in which it made no ruling on Plaintiff's claim that Defendants had engaged in a pattern or practice of racial discrimination. . . .

After remand, the Government filed on May 14, 1973, with the Judge below (and thus that filing does not appear on the Clerk's docket sheet) "Plaintiff's Proposed Findings of Fact and Conclusions of Law on Remand" in which the Government did *not* request the lower court to find that Northside's actions had constituted a "pattern or practice" of discrimination.

In Northside's Brief on Remand filed with the lower court July 16, 1973, Northside said (p. 25):

> The Court previously concluded that the record did not support a finding of a "pattern or practice of resistance" and the Government does not ask that the Court so find. The Government does ask (page 18 [of Plaintiff's Proposed Findings of Fact and Conclusions of Law on Remand]) that this Court again find that "black people as

> a group have thereby been denied the protection guaranteed by the Act."

And at page 27 of the same Brief, Northside said:

> It has been noted that the Government does not even argue here that the record would support a finding of pattern or practice violation.

In response, the Government said (Memorandum in Opposition to Defendants' Motions of July 17, 1973) in a memorandum filed July 30, 1973 at page 3, footnote:

> Defendants state (brief, p. 18) that this Court previously found the evidence insufficient to support a finding of "pattern or practice", although this Court's opinion was in fact silent on the issue. Defendants also argue (p. 20) that the Government "does not even claim" pattern or practice; in fact, the United States has claimed throughout this case that there was one, but notes that the remand by the Court of Appeals did not require this Court to reconsider its silence on that issue.

Thus, upon remand, the Government did *not* request a pattern or practice finding and expressly noted that the lower court had no obligation to make a finding on "pattern or practice".

Thereafter, the lower court made it clear that it had treated the case as one raising an issue of general public importance. It said in its second opinion (S.A. 4):

> The Court, on December 30, 1971, entered an Order finding that the defendants had denied rights secured under the Fair Housing Act of 1968, to persons protected thereby and that this denial raised an issue of general public importance.

The ensuing second opinion was, insofar as this petition is here concerned, like the first in all material respects.

BLEED THROUGH

It is respectfully submitted that the record supports the assertion that the Government was not, at the time of this Court's consideration of *Northside II*, claiming that any court should make a finding of "pattern or practice" of discrimination. It is also respectfully submitted that the record shows the lower court never made a *finding* that Northside was engaged in a "pattern or practice" of discrimination (see paragraph 10, *infra*).

3

Northside asks that the first sentence of paragraph 5 of the Court's opinion be changed to read as follows:

> This Court also recognized that the Government sought injunctive relief and claimed that appellants actions constituted a pattern or practice of resistance to the Fair Housing Act, and had denied groups of persons rights granted by the Act ~~thus~~ raising an issue of general public importance.

The requested change is necessary to reflect accurately this Court's statement in "*Northside I*, 474 F.2d at 1165", and also to reflect accurately the record. As fully set out in Northside's Supplemental Brief of November 11, 1974 (at p.2), the Government originally made two allegations: First, it was alleged that Northside's actions showed its was engaged in a pattern or practice of resistance to the full enjoyment of the rights granted by Title VIII. Secondly, it was alleged that Northside's actions denied a group of persons rights granted by Title VIII, and that such denial raised an issue of general public importance. But it was not contended that Northside's actions constituted a pattern or practice which raised an issue of general public importance.

4

The Court is requested to amend the third sentence in the third paragraph on page 7558 to read as follows:

> However, in this instance, counsel has been doubly wrong since we have in fact even complied with the standards of the Fourth Circuit for the District Court recognized that the Government had the burden of proof ~~in showing a violation of the Fair Housing Act.~~ to show by a preponderance of the evidence that the defendants have either engaged in a "pattern or practice of resistance" to rights granted under the Act, or have denied rights secured by the Act to a group of persons, where such denial raises an issue of general public importance. [The underscored language is a quotation from the District Court's opinion referred to by the Court (S.A.13).]

The change is necessary fully to reflect what the District Court "recognized" and apparently also what this Court intended to approve.

5

The Court is requested to amend the fourth sentence of the first full paragraph on page 7559 of its opinion to read as follows:

> Appellant urges that the case be referred "to the [current] Attorney General for another determination of whether 'reasonable cause' existed . . . because the allegations available to the Attorney General in office when the first complaint was issued failed of proof or were found not to support the relief sought" [To quote this Court in *Northside II* at 501 F.2d 182] ~~whenever a new Attorney General is appointed that person must re-examine every case for a fresh determination of public importance~~.

BLEED THROUGH

It is important that Northside's contentions be correctly stated. No Attorney General has ever determined that the facts, as assertedly proved at the trial, presented a denial of rights raising an issue of general public importance so as to warrant prosecution of the case after remand.

6

Northside asks that the following sentence be added to the first full paragraph at page 7560:

> We hold that when an Attorney General finds reasonable cause to believe (and alleges) that there has been a denial of rights raising an issue of general public importance, he does not have to prove, and the district court does not have to find, the existence of that factual allegation as a predicate for the issuance of an injunction.

We believe the foregoing correctly states the holding of the Court and confirmation thereof would be helpful to all interested in Title VIII issues.

7

Northside asks that the first sentence of the last paragraph at page 7560 be changed to read:

> As of the time of the trial in July, 1971, Northside ~~has~~ had sold more than 3,000 homes since the effective date of the Fair Housing Act—none to a black person.

The statement in the Opinion should be amended to reflect the record which does show sales to black (*e.g.*, S.A.29).

8

The Court is requested to amend the second sentence in the second full paragraph on page 7561 to read as follows:

> Further, Mr. Isakson's statements to black broker ~~realtor~~ Harold Dawson indicated Mr. Isakson's unwillingness to cooperate or deal with black brokers ~~realtors~~ and their clients.

"Realtor" means [The Concise Oxford Dictionary of Current English, Oxford (1958)]:

> Real Estate agent . . . who is a member or affiliated member of the National Association of Real Estate Boards . . .

Further, as pointed out in *The American College Dictionary* [Random House (1962)], the word was coined by C. N. Chadbourn of Minneapolis, and was formally adopted by the Association in 1916. No evidence of record shows any relationship between Mr. Isakson and any "Realtor".

9

The Court is requested to amend the second full paragraph on page 7561 by adding the following sentence:

> We hold that, even though the lower court found only two instances of violation of the Act, each occurring in early 1970 and each allegedly done by Mr. Isakson, the lower court, in late 1973, properly issued an injunction against all of Northside's "officers, employees, brokers [and] agents" (S.A. 14) under 42 U.S.C. § 3613(a) which permits injunctions against "the person or persons responsible for such . . . denial or rights."

The amendment is appropriate to state the Court's holding.

10

The Court is asked to correct footnote 10, page 7561, to read as follows:

BLEED THROU

It is true that the complaint filed by the Government specifically charges an unlawful pattern and practice but and the District Court never so found ~~and which apart from the infection of non-constitutional burdens on the objecting realtor, we found supported by the evidence. Northside I, *supra* at 1171 (see notes 2 and 3, *supra*)~~.

See paragraph 2 of this Petition. For the same reasons, the last sentence on page 7562 should be amended, insofar as it intimates a District Court "finding".

11

We also request that, when counsel are designated in the published decision, only the undersigned's name appear. The writer is wholly responsible for the language in the petition which was criticized by the Court. Although the name of an associate appears on the Petition, he had nothing to do with that language.

WHEREFORE, Northside respectfully requests that the Court amend its opinion as hereinabove requested and grant such other, further and different relief as to the Court may appear appropriate.

Respectfully submitted

/s/ HAROLD L. RUSSELL
Attorney for Defendants-Appellants

Atlanta, Georgia
September 17, 1975

Certificate of Service

I Hereby Certify that I am of counsel for Defendants-Appellants, Northside Realty Associates, Inc. and Ed A. Isakson, and hereby certify that I have served on Plaintiff-Appellee

ROUGH

a true copy of this "Petition for Rehearing So as to Make Corrections and Amendments in Opinion," to the following counsel of record for Plaintiff-Appellee:

Frank E. Schwelb, Esq.
David T. Kelley
Fair Housing Section, Civil Rights Division
U. S. Department of Justice
Constitution Avenue
Washington, D. C. 20530

This 18th day of September, 1975.

/s/ Harold L. Russell
Of Counsel for Defendants-Appellants

BLEED THROU

In the United States Court of Appeals
For the Fifth Circuit

No. 74-1414

United States of America,
Plaintiff-Appellee,

versus

Northside Realty Associates, Inc., et al.,
Defendants-Appellants.

Appeal from the United States District Court for the
Northern District of Georgia

Before BROWN, Chief Judge, THORNBERRY and AINSWORTH, Circuit Judges

BY THE COURT:

IT IS ORDERED that appellants' petition for rehearing so as to make corrections and amendments in opinion is Denied.

ROUGH

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-792

NORTHSIDE REALTY ASSOCIATES, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners, one of the largest residential real estate firms in Atlanta, Georgia, and the firm's Vice President and principal broker, seek review of a decision affirming a district court order enjoining them from further violations of the Fair Housing Act (Title VIII of the Civil Rights Act of 1968, 82 Stat. 81 *et seq.*, 42 U.S.C. 3601 *et seq.*).

Petitioners do not challenge the findings below that they engaged in racial discrimination in housing; nor do they suggest that the injunction entered by the district court is inappropriate in light of their proven illegal conduct. Rather, petitioners' sole contention is that the Attorney General was not authorized to seek and obtain the relief granted in the absence of an independent judicial determination of the "general public importance" of the federally protected rights at issue.

1. Section 813 of the Fair Housing Act, 42 U.S.C. 3613, authorizes the Attorney General to bring suit for an injunction or other order whenever he has reasonable cause to believe that (1) any person or group of persons is engaged in a pattern or practice of resistance to the rights granted by the Act, or (2) any group of persons has been denied rights granted by the Act and such denial "raises an issue of general public importance." In July 1970, the Attorney General instituted this action against petitioners, alleging that they had refused to make housing available to black persons on account of race.

Following a trial, the district court concluded that the government had proven violations of the Act "of sufficient public importance to authorize the relief * * * granted" (Pet. App. A-8). Specifically, the court found *inter alia* that petitioner Northside, which sells thousands of homes each year, had never sold a single one to a black person (Pet. App. A-2) and that petitioner Ed Isakson had in substance admitted a racially discriminatory policy by publicly intimating to other real estate salespeople that they tell a half-truth (as he had done) to avoid dealing with a black prospect (Pet. App. A-2 to A-3).

On petitioners' first appeal, the court of appeals remanded because the district court's opinion had not stated with sufficient clarity which portion of Section 3613 it had relied upon in fixing liability, and because of the possibility that the court's decision may have been based on statements by petitioner Isakson that challenged the constitutionality of the Fair Housing Act (Pet. App. A-18 to A-22). The Fifth Circuit, however, expressly rejected petitioners' contention that the Attorney General's determination of general public importance was subject to judicial review (Pet. App. A-16):

> The question of what constitutes an issue of general public importance is, absent specific statutory standards, a question most appropriately answered by the executive branch. [Citations omitted.] Just as in his determination whether to prosecute a criminal case, the Attorney General must have wide discretion to determine whether an issue of public importance is raised.

On remand, the district court (1) found that the government "was entitled to relief without regard to [petitioner's] statement about constitutionality" (Pet. App. A-29), (2) essentially reiterated its initial findings of violations of the Act, and (3) again concluded, despite the court of appeals' holding that such an inquiry was for the Attorney General alone, that the "denial of protection is of sufficient public importance to authorize the relief * * * granted" (Pet. App. A-37).[1]

Petitioners appealed once more and the court of appeals affirmed *per curiam*, declining a suggestion to remand the case to the Attorney General for a redetermination whether the facts warranted bringing of the lawsuit (Pet. App. A-41 to A-42). On September 4, 1975, the court of appeals denied a petition for rehearing, adhering to its two earlier opinions and noting again that the district court "had ample basis for concluding that Northside Realty * * * has violated the Fair Housing Act so as to require enjoining Northside from further violations of the Act" (Pet. App. A-45, A-53).

2. The decision of the court of appeals that, at least in the absence of specific statutory standards, it is for the executive and not the judiciary to determine whether a fact situation raises an issue of "general public importance" is

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[1] The district court's injunction is reprinted at Pet. App. A-37 to A-40.

correct and warrants no further review. As the Fifth Circuit noted (Pet. App. A-54), ascertaining "what constitutes an issue of general public importance is hardly susceptible of 'proof' in the normal legal sense at all." Moreover, the court's holding is consistent with a variety of decisions in this and related areas that have left the determination to the Attorney General. See, *e.g.*, *United States* v. *Bob Lawrence Realty, Inc.*, 474 F.2d 115 (C.A. 5), certiorari denied, 414 U.S. 826 (housing); *United States* v. *Greenwood Municipal Separate School District*, 406 F.2d 1086 (C.A. 5), certiorari denied, 395 U.S. 907 (school desegregation); *United States* v. *Gustin-Bacon*, 426 F.2d 539 (C.A. 10) (employment). See also *Cornelius* v. *City of Parma*, 374 F. Supp. 730, 744, n. 18 (N.D. Ohio), and cases cited at Pet. App. A-54 to A-55, n. 11. Contrary to petitioners' assertions (Pet. 14), this interpretation of Section 3613 does not grant the Attorney General unbridled power to obtain an injunction. In a suit brought by the government, a violation of the Fair Housing Act must still be proven and the other requisites of equitable relief satisfied.

In any event, petitioners do not suggest that this litigation lacks "general public importance" and, as noted above, the district court expressly concluded that the "denial of protection is of sufficient public importance to authorize the relief herein granted" (Pet. App. A-37). This finding is certainly appropriate in light of the size of petitioner's real estate firm and the individual petitioner's effective admission of a racially discriminatory policy and implicit attempt to encourage resistance to the Act.

3. Nor is review by this Court necessary to resolve the alleged conflict (Pet. 9-12) between the approach taken by the court below and that in *United States* v. *Hunter*, 459 F. 2d 205 (C.A. 4), certiorari denied, 409 U.S. 934. Although language of the Fourth Circuit in *Hunter* suggests that a dis-

trict court must find the case to be of "general public importance" before relief under the second alternative of Section 3613 may be granted, the court of appeals affirmed the denial of injunctive relief in that case not because the issue presented was unimportant (the court explicitly found to the contrary, 459 F.2d at 218), but because declaratory relief had been granted and the violation was unlikely to recur. 459 F.2d at 220. Indeed, since the Fourth Circuit essentially held that an issue of "general public importance" will exist whenever the Attorney General proves that a group of persons has been denied benefits of the Act, any difference between the circuits is in language, not result. As the court below noted (Pet. App. A-48 to A-49):

> Moreover, *Hunter* is of little help to appellant's argument. In that case, the Fourth Circuit held two isolated, allegedly discriminatory acts insufficient to establish a pattern or practice of resistance. 459 F.2d at 217. Nonetheless, the *Hunter* Court held that, under the same facts, the Government "clearly" had established its right to bring the case as raising an issue of general public importance. 459 F.2d at 217-218. *Hunter* thus is of little solace to a party arguing that even though a violation of the Fair Housing Act has been established, the issue is still not one the Attorney General might deem to be of public importance.

The absence of conflict between the two courts of appeals is further demonstrated by the fact that subsequent district court decisions in the Fourth Circuit have continued to hold that the question whether a case is of "general public importance" is for the executive branch to decide. See, *e.g.*, *United States* v. *Hughes Memorial Home*, 396 F. Supp. 544, 551-552 and n. 7 (W.D. Va.); *United States* v. *Long*, D. S.C., No. 71-1262 (January 14, 1974), modified as to relief, C.A. 4, No. 74-1398 (October 28, 1975).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

J. STANLEY POTTINGER,
Assistant Attorney General.

WALTER W. BARNETT,
MIRIAM R. EISENSTEIN,
Attorneys.

FEBRUARY 1976.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-792

NORTHSIDE REALTY ASSOCIATES, INC., and
ED A. ISAKSON,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR REHEARING

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Attorneys for Petitioners

April 16, 1976

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-792

NORTHSIDE REALTY ASSOCIATES, INC., and
ED A. ISAKSON,
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v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR REHEARING

Petitioners, Northside Realty Associates, Inc., and Ed A. Isakson, respectfully move this Court for an Order (1) vacating its denial of the Petition for Writ of Certiorari entered on March 22, 1976,[1] (2) granting this Petition for Rehearing and (3) granting the Writ of Certiorari. As grounds for this Motion, Petitioners state the following:

[1]The Clerk's Notice stated "Mr. Justice White and Mr. Justice Blackmun would grant certiorari."

INTRODUCTORY BACKGROUND

The result of the denial of certiorari in this case is to leave parties in this increasingly active area of civil rights litigation[2] with the following prospects:

In the Fifth Circuit, the Attorney General will allege in the complaint that there has been a denial of rights under the Fair Housing Act raising an issue of general public importance *but will not be required* to prove that allegation as a predicate for the grant of injunctive relief. *United States v. Northside Realty Associates, Inc.*, 474 F.2d 1164 at 1168, (5th Cir. 1973), 501 F.2d 181 (5th Cir. 1974), 518 F.2d 884 (5th Cir. 1975) (hereinafter collectively referred to as "*Northside*").

In the Fourth Circuit, the Attorney General will allege a denial of rights under the Fair Housing Act raising an issue of general public importance *and will be required* to prove that allegation as a predicate for the grant of injunctive relief. *United States v. Hunter*, 459 F.2d 205, 217 (4th Cir. 1972) (hereinafter referred to as "*Hunter*").

In opposing the Petition for Certiorari herein, the Attorney General argued that the facts before the district court could have warranted findings and a factual conclusion that the incidents proved did reflect, under *Hunter* standards, a denial raising an issue of general public importance. Government Memorandum in Opposition, pp. 4-5. Of course, Petitioners did not here argue (*cf.* Government Memorandum, p. 4) that the facts did not justify such findings and conclusion, since this Court

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[2]During the past 15 months the Attorney General has instituted 35 Fair Housing Act cases involving similar issues (information compiled from Department of Justice press releases, January 1975 to date).

does "not try issues of fact *de novo*." *United States v. E. I. Du Pont de Nemours & Co.*, 351 U.S. 377, 381 (1956). However, this Court's denial of certiorari here leaves litigants to perplexity since it cannot be ascertained whether the denial was because the Court (1) agreed with the Fifth Circuit's view of the law in *Northside*, or (2) agreed with the Fourth Circuit's view of the law in *Hunter and* with the Government's contention that the facts would warrant *Hunter* findings and a factual conclusion of a denial raising an issue of general public importance.

Although there is nothing new in the foregoing paragraphs, it may be that the Court was unaware of the consequences of the denial of certiorari and there is now evidence that the lengthy litigation in this case will produce only a continuation of the Government's stereotyped presentations to the district courts which are distortions of both *Northside* and *Hunter*.

MATTERS ARISING SINCE THE PETITION HEREIN WAS FILED AND OTHER MATTERS NOT PREVIOUSLY PRESENTED

On March 25, 1976, the Attorney General filed a complaint[3] in the United States District Court for the District of Columbia, styled *United States v. Brown-Kessler Co., Inc.*, Civil Action No. 76-0486, in which it was alleged (paragraph 6):

> The defendant's conduct described in the preceding paragraph constitutes
>
> (a) A pattern and practice of resistance to the full enjoyment of rights secured by Title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3601 *et seq.*; and

[3]Copy of the complaint is attached hereto as Appendix A.

> (b) A denial to groups of persons of rights granted by Title VIII of the Fair Housing Act of 1968, 42 U.S.C. 3601 *et seq.*, which denial raises an issue of general public importance.

Thus, it appears that the Attorney General is continuing to represent to the district courts that the Government will, in these Fair Housing Act cases, actually prove that there was conduct constituting a "denial . . . which raises an issue of general public importance."[4] Of course, if the law were as represented to this Court in the Government's Memorandum in Opposition, or if this Court's denial of certiorari reflected an adoption of *Northside*, the aforesaid allegation would be superfluous and the Attorney General need only by *ipse dixit* affirm that he had made a determination that the facts reflect a denial raising an issue of general public importance.

If the foregoing were not enough to reflect uncertainty as to the law by those who would be thought to know it best, the confusion is made more obvious by the Government's boiler plate pleadings subsequent to the complaint which facilely ask the district courts to make the following conclusion:

> 6. To prevail on the merits, the United States must show that the defendants have either:
>
> a. Engaged in a "pattern or practice" of resistance to the full enjoyment of the right to equal housing opportunity; or
>
> b. Denied rights granted by the Fair Housing Act to a group of persons under circumstances which the

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[4]Such an allegation was made in the complaint in the instant case, filed July 10, 1970 and a like allegation appears in the complaint, filed November 7, 1975, shortly before the Petition for Certiorari was filed in this case, in *United States v. Holmes et al.*, Civil Action No. C75-2171A (D.C.N.D.Ga.).

> Attorney General has determined raise an issue of general public importance. 42 U.S.C. 3613. See *United States v. Bob Lawrence Realty, Inc.*, 474 F.2d at 122-123; *United States v. Northside Realty Associates, Inc.*, 474 F.2d 1164, 1168 (5th Cir. 1973).

U.S. v. Hilton-Sykes, P.H.E.O.H. Rptr. ¶13,727 (M.D.Fla. 1975).[5]

Thus, after alleging it will prove a " 'pattern or practice' of resistance" or a denial raising "an issue of general public importance", the Government subtly shifts its position and asks for a factual finding by the district court as to the existence of a pattern or practice, but avoids proof of "circumstances which . . . raise an issue of general public importance" by maintaining that it is enough that the "Attorney General has determined" such circumstances exist. In so doing, the Government relies upon the Fifth Circuit's decisions in *Bob Lawrence* and *Northside* and fails to note the contrary relevant holding in *Hunter*.

The Government's suggestion (Memorandum In Opposition, p. 5) that district court decisions, such as *United States v. Hughes Memorial Home*, 396 F.Supp. 544 (W.D. Va. 1975), and *United States v. Long*, P.H.E.O.H. Rptr. ¶13,631 (C.D. S.C. 1974), reflect some inclination to follow *Northside* and ignore *Hunter* is not accurate. The Court in *Hughes* actually said (at pp. 550-551) to "prevail on the merits of this action, the United States must

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[5]The quoted conclusion was adopted verbatim by the district court in its decision of September 18, 1975 from the Government's Proposed Findings and Conclusions filed with the Court June 15, 1975. See Appendix B hereto and note that the Government treats *Hunter* as if it did not exist. Although Petitioners do not have in hand more current Government pleadings, it is believed that there has been no change in the Government's representations to district courts.

show that the defendants have either . . . engaged in a pattern or practice of resistance . . . or denied rights . . . which denial raises a question of general public importance", and it relied on *Hunter*.[6] It is true that the court in a later apparent contradiction said that the Attorney General's determination of general public importance is not subject to judicial review, but it is not clear whether the court had in mind the Attorney General's standing to bring suit or what he must prove as a predicate for relief, and it is clear that the court never addressed itself to the conflict between *Hunter* and *Northside* on the latter point. In *Long*, the district court said to "prevail on the merits in this case, the United States must show that the defendants have either . . . engaged in a 'pattern or practice' of resistance . . . or denied rights to a group of persons and the Attorney General has determined that such denial raises an issue of general public importance", and it referred to *Bob Lawrence*, but not at all to *Hunter* apparently because it simply copied the Government's proposed findings of fact and conclusions of law which omitted reference to *Hunter*. See Appendix D hereto. Moreover, even though the district court in *Long*, as did the court in *Hughes*, went ahead to say that the "Attorney General's determination as to an issue of general public importance . . . is not subject to review," it nevertheless proceeded to find facts which it said satisfied "the issue of general public importance," apparently following *Hunter*. (See P.H.E.O.H. Rptr. at p. 14,092). On appeal in *Long*, the Fourth Circuit was not called upon to ad-

[6]The full text of the Government's proposed conclusion, which was adopted verbatim by the district court, appears in Appendix C hereto. The departure from the Government's usual form and the reference to *Hunter* were apparently in deference to the Fourth Circuit forum and reflect awareness of, but no universal obeisance to, *Hunter*.

dress the question of the necessary findings to support the grant of relief and it recited that the district court had actually found that the denial there "raised an issue of general public importance" (P.H.E.O.H. Rptr., pp. 14,634 and 14,635). There is no reason to believe that the district courts of the Fourth Circuit will not follow *Hunter* when that decision is called to their attention.

The Government opposed certiorari in *Hunter* and in this case. In cases such as *Hilton-Sykes*, *Hughes* and *Long*, the assumed overwhelming expertise of the Government produced decisions adopted verbatim from the Government's proposed findings and conclusions without contest of the issue. Decisions of that kind will multiply unless certiorari is granted and the Government and affected parties are authoritatively advised as to the law.

CONCLUSION

It is respectfully urged that the denial of certiorari would leave the law applicable to a burgeoning number of cases unsatisfactorily uncertain; that the Court's previous order should be reconsidered; and that certiorari should be granted.

Respectfully submitted,

HAROLD L. RUSSELL
Counsel for Petitioners

Atlanta, Georgia
April 16, 1976

CERTIFICATE OF COUNSEL

As counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

_____

Counsel for Petitioner

BLEED THROUG

CERTIFICATE OF SERVICE

I hereby certify that I am of counsel for Petitioners, Northside Realty Associates, Inc. and Ed A. Isakson, and hereby certify that I have served a true copy of this "Petition for Rehearing" on the following counsel of record for Respondents.

FRANK E. SCHWELB, ESQ.
DAVID T. KELLEY, ESQ.
Fair Housing Section,
Civil Rights Division
U.S. Department of Justice
Constitution Avenue
Washington, D.C. 20530

This 16th day of April, 1976.

HAROLD L. RUSSELL
Of Counsel for Petitioners

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Appendix A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, by its Attorney General c/o The U.S. Department of Justice, Civil Rights Division 9th & Constitution Ave., N.W. Washington, D.C.	)	CIVIL ACTION NO. 76-0486
Plaintiff,	)	*COMPLAINT FOR VIOLATION OF TITLE VIII OF THE CIVIL RIGHTS ACT OF 1968, 42 U.S.C. 3601 et. seq.*
v.	)	
BROWN-KESSLER COMPANY, INC., 4708 Bradley Boulevard Chevy Chase, Maryland	)	
Defendants.	)	

The United States of America, by Edward H. Levi, Attorney General, alleges:

1. This is an action brought by the Attorney General on behalf of the United States pursuant to 42 U.S.C. 3613, seeking relief for violations of Title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3601 *et seq., as amended* by the Housing and Community Development Act of 1974, Pub. L. No. 93-383, §808 (August 22, 1974).

2. This Court has jurisdiction of this action under 28 U.S.C. 1345 and 42 U.S.C. 3613.

3. Defendant Brown-Kessler Company, Inc. manages the Coronet Hotel Apartments, located at 200 C Street, S.E., Washington, D.C. This defendant is incorporated under the laws of Delaware, but transacts business in Washington, D.C. through its management of said apart-

ments, and is subject to suit in this Court pursuant to 42 U.S.C. 3613.

4. The Coronet Hotel Apartments consist of one hundred six (106) furnished units, all of which are dwellings within the meaning of Title VIII of the Civil Rights Act of 1968.

5. Defendant has maintained a policy and practice of discrimination against men in the operation of the Coronet Hotel Apartments because of sex. This policy and practice has been implemented by discriminating in the terms and conditions of rental of dwellings because of sex. Specifically, defendant has required male tenants to take and pay a substantial charge for maid and linen service as a condition of renting a dwelling, while not imposing such requirement as a condition for renting a dwelling to females. Such conduct is in violation of 42 U.S.C. §3604(b), as amended.

6. The defendant's conduct described in the preceding paragraph constitutes

(a) A pattern and practice of resistance to the full enjoyment of rights secured by Title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3601 *et. seq.*; and

(b) A denial to groups of persons of rights granted by Title VIII of the Fair Housing Act of 1968, 42 U.S.C. 3601 *et seq.*, which denial raises an issue of general public importance.

WHEREFORE, the plaintiff, United States of America, prays that the Court enter an Order enjoining the defendant, its employees, agents and successors and all those in active concert or participation with any of them from:

(a) Engaging in any conduct which has the purpose or effect of denying or abridging any right secured by Title VIII of the Civil Rights Act of 1968 or interfering with the exercise of that right, and

(b) Failing or refusing to take such adequate affirmative steps as may be necessary and appropriate to correct the effects of past unlawful practices described in this Complaint, including the restoration of any victims or groups of victims of unlawful discrimination to their rightful place.

Plaintiff further prays for such additional relief as the interests of justice may require, together with the costs and disbursements of this action.

EDWARD H. LEVI
Attorney General

J. STANLEY POTTINGER
Assistant Attorney General

EARL J. SILBERT
United States Attorney

FRANK E. SCHWELB
Chief, Housing Section
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SUSAN C. CHAIRES
Attorney, Housing Section
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Washington, D.C. 20530

Appendix B

Relevant Portion of Findings and Conclusions Filed by the Government in *Hilton-Sykes*, June 15, 1975.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA TAMPA DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	CIVIL ACTION NO.
	)	74-322-CIV-T-H
v.	)	
	)	
HILTON-SYKES RENTAL AGENCY, INC., E. H. SYKES, President, and JOE THOMAS, Rental Agent,	)	
	)	
Defendants.	)	
	)	

PLAINTIFF'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER

JOHN L. BRIGGS
United States Attorney

FRANK E. SCHWELB
Chief
MARTIN BARENBLAT
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Housing Section
Civil Rights Division
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Of Assistance:
PAMELA REAVILLE
Research Analyst
Civil Rights Division
Department of Justice

6. To prevail on the merits, the United States must show that the defendants have either:

a. Engaged in a "pattern or practice" of resistance to the full enjoyment of the right to equal housing opportunity; *or*

b. Denied rights granted by the Fair Housing Act to a group of persons under circumstances which the Attorney General has determined raise an issue of general public importance. 42 U.S.C. 3613. See *United States* v. *Bob Lawrence Realty, Inc., supra,* 474 F. 2d at 122-123; *United States* v. *Northside Realty Associates, Inc.,* 474 F. 2d 1164, 1168 (5th Cir. 1973).

Appendix C

Extract from Government's Proposed Findings of Fact and Conclusions of Law In *Hughes*, Filed April 7, 1975

10. To prevail on the merits of this action, the United States must show that the defendants have either:

(a) engaged in a pattern or practice of resistance to the full enjoyment of the right to equal housing opportunity; or

(b) denied rights granted by the Act to a group of persons, which denial raises a question of general public importance. 42 U.S.C. 3613.

See *United States* v. *Hunter, supra; United States* v. *Bob Lawrence Realty Co.*, 474 F. 2d 115, 122-23 (5th Cir. 1973), *cert. den.*, 414 U.S. 826 (1974), and cases there cited.

Appendix D

Relevant Portion of Findings and Conclusions filed by the Government in *United States* v. *Long*, November 15, 1973.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA CHARLESTON DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	CIVIL ACTION NO. 71-1262
	)	
v.	)	
	)	
J. C. LONG, *et al.,*	)	
	)	
Defendants.	)	

PLAINTIFF'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECREE

JOHN K. GRISSO
United States Attorney

RONALD A. HIGHTOWER
Assistant U.S. Attorney

J. STANLEY POTTINGER
Assistant Attorney General

FRANK E. SCHWELB
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Of Assistance:

ROBERT H. ALSDORF
Law Clerk
SUSAN SHAPIRO
Research Analyst
Civil Rights Division
Department of Justice

12. To prevail on the merits in this case, the United States must show that the defendants have either:

a. engaged in a "pattern or practice" of resistance to the full enjoyment of the right to equal housing opportunity; or

b. denied rights granted by the Fair Housing Act to a group of persons, and the Attorney General has determined that such denial raises and issue of general public importance.

42 U.S.C. 3613. See *United States* v. *Bob Lawrence Realty, Inc., supra,* 474 F. 2d at 122-123, and cases there cited.